



Citation: *LW v Canada Employment Insurance Commission*, 2022 SST 1390

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

Decision

Appellant: L. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (449964) dated February 2, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: June 1, 2022

Hearing participant: Appellant

Decision date: June 6, 2022

File number: GE-22-808

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 not entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant worked as a decision support consultant with a hospital and worked from home during the pandemic. The employer dismissed the Claimant on October 22, 2021 because she did not comply with the covid19 vaccination policy at work.² The Claimant then applied for EI regular benefits.³

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she lost his employment due to her own misconduct.⁴

[5] The Claimant disagrees because she does not want to disclose her vaccination status to her employer for privacy reasons.⁵ Also, she was not aware that she would lose her job for not complying with the employer's covid19 vaccination policy.

Matter I have to consider first

The Claimant asked me to reschedule the hearing

[6] This case was scheduled to be heard by teleconference on June 1, 2022.⁶ The notice of hearing was sent to the Claimant on March 24, 2022.

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

² See record of employment at GD3-21; termination letter at GD3-45 to GD3-47;

³ See application for benefits at GD3-4 to GD3-20.

⁴ See initial decision at GD3-36 to GD3-37 and reconsideration decision at GD3-72 to GD3-73.

⁵ See notice of appeal forms at GD2-1 to GD2-15.

⁶ See GD1-1 to GD1-3.

[7] On May 30, 2022, the Claimant wrote to the Tribunal asking for an adjournment to another date.⁷ She explained that there was a mediation session scheduled with her employer on June 22, 2022. She was concerned that any money she receives from EI benefits would need to be paid back from the settlement with her employer.

[8] I denied the Claimant's request to adjourn the hearing because the mediation related to her wrongful dismissal claim is unrelated to her claim for EI benefits.⁸ As well, the Tribunal had already booked time to hear the case. I must also conduct proceedings as informally and quickly as the circumstances and considerations of fairness and natural justice permit.⁹

Issue

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

Analysis

[10] Claimants who lose their job because of misconduct are disqualified from receiving EI benefits.¹⁰

[11] 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?

[12] The parties agree that the Claimant lost her job on October 21, 2021 because she was dismissed from her employment. This is consistent with the Claimant's testimony and the evidence in the file.¹¹

⁷ See GD8-1.

⁸ See GD9-1 to GD9-3.

⁹ See section 3(1) of the *Social Security Tribunal Regulations*.

¹⁰ See section 30 of the EI Act.

¹¹ See record of employment at GD3-21; termination letter at GD3-45 to GD3-47; see Claimant's meeting notes at GD3-61.

What was the employer's policy?

[13] The employer implemented a "covid19 vaccination program" policy (policy) effective July 5, 2021 and reviewed on September 3, 2021. A copy of the policy is included in the file.¹²

[14] The policy required that employees be fully vaccinated by October 8, 2021. That deadline date was revised to October 21, 2021. It also required employees to disclose their vaccination status to the employer.

[15] The Claimant testified that she understood the policy and the requirement to disclose her vaccination and be vaccinated. She acknowledges completing an educational program about covid19 sometime in July 2021. However, her main objection to the policy is that she wants her vaccination status to remain "undeclared" to the employer for privacy reasons.

What the policy communicated to the Claimant?

[16] The employer told the Commission that all employees were notified on August 31, 2021 that they needed to be fully vaccinated, even if they were working from home or off-site.¹³

[17] The Claimant agrees that the policy was first communicated to her around the end of August 2021. She also received web links to the policy, reviewed it and had communications with the employer about the policy in September 2021 and October 2021.

What were the consequences of not complying with the policy?

[18] The policy states that to be considered immunized/vaccinated, all staff must provide proof of vaccination.¹⁴ They are permitted to withhold this information, but the

¹² See policy at GD3-51 to GD3-54.

¹³ See supplementary record of claim at GD3-24.

¹⁴ See GD3-51.

policy says that staff who choose not to declare their status will be considered unvaccinated, unless they have a medical or other human rights accommodation.

[19] The policy also says that staff who are deemed not vaccinated will not be accommodated and not allowed to report to work.¹⁵ It will result in an unapproved and unpaid leave of absence until they are 14 days past being fully vaccinated.

[20] The employer met the Claimant on October 13, 2021 to discuss the policy. The Claimant included notes taken from that session.¹⁶ At the meeting, the Claimant was told she was terminated and that the termination meeting would take place on October 22, 2021.

[21] At the hearing, the Claimant argued that the policy was not clear because it does not say she would be dismissed. She did not know she would be dismissed for not complying with the policy.

Is there a reason the Claimant could not comply with the policy?

[22] The policy provided accommodation for those with a valid medical exemption or those with an exemption under the *Human Rights Code* from October 21, 2022.¹⁷

[23] The policy says that if an accommodation is approved, employees could do a self-administered covid19 antigen testing and document the results prior to attending work.

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

[24] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁸ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁹

¹⁵ See GD3-52.

¹⁶ See GD3-61 to GD3-62.

¹⁷ See GD3-51.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[25] The Claimant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.²⁰

[26] 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.²¹

[27] 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.²²

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

[29] First, I was not persuaded by the Claimant's evidence that she did not know or could not have known she would be dismissed. The Claimant took notes from her meeting with the employer on October 13, 2021. At that meeting, she told them that she would not consent to releasing her health information about vaccination status. Her employer then said she was terminated and that a termination meeting would be scheduled for October 22, 2021.

[30] There were 9 days before her termination meeting took place on October 22, 2022. I note that the Claimant did not take any steps to try to comply with the policy during the period leading up to her termination meeting.

[31] In my view, the Claimant ought to have known that by not complying with the policy could get in the way of carrying out her duties working for a hospital, even if she was working remotely during the pandemic. She should have known there was a possibility she would be terminated for her continued non-compliance with the policy.

²⁰ See *Attorney General of Canada v Secours*, A-352-94.

²¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²² See *Minister of Employment and Immigration v Bartone*, A-369-88.

While the policy does not expressly say that termination was a consequence of not complying, it does say that it result in an unapproved unpaid leave of absence and that employees would not be permitted to report to work.

[32] Second, I find that the Claimant willfully and consciously chose not to comply with the policy. The employer clearly communicated the policy to her and there was sufficient time to comply. She made a deliberate choice not to comply with the policy and her conduct resulted in losing her employment. As noted above, the Claimant does not have to have wrongful intent for it to be misconduct.²³

[33] Third, the policy provided for exemptions for employees with a valid medical exemption or under the *Human Rights Code*.²⁴ The Claimant did not ask for exemption because she wanted her vaccination status to remain undisclosed. She identifies as Christian and has documentation to prove it, but did not think it was appropriate for Human Resources to decide this issue. In my view, the Claimant made a personal choice to not comply with the policy. She did not ask for an exemption even though the policy provided an opportunity to do so.

[34] The *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human Rights Code*²⁵ as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.²⁶

[35] I acknowledge that the Claimant has the authority to decide whether she wants to be vaccinated and/or to disclose her vaccination status to her employer. It was her choice that ultimately led to undesirable outcomes, such as job loss and loss of income.

²³ See *Attorney General of Canada v Secours*, A-352-94.

²⁴ See *Human Rights Code*, R.S.O. 1990, c. H.19.

²⁵ See *Human Rights Code*, R.S.O. 1990, c. H.19.

²⁶ See article titled "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates" dated September 22, 2021 at https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates.

[36] I also acknowledge that the employer has the authority to manage their day-to-day operations, which may include the development and imposition of policies at the workplace to ensure the health and safety of employees and others. In this case, the hospital implemented a policy “to ensure a safe and healthy environment for staff, affiliates, patients and visitors/care partners”.²⁷

[37] The purpose of the *Employment Insurance Act* is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment which is insured against must be involuntary.²⁸ This is not an automatic right, even if a Claimant has paid EI premiums.

[38] In this case, the Claimant was not terminated involuntarily because it was her non-compliance with the employer’s policy that led her dismissal. Based on my findings above, I find that the Claimant lost her job because of misconduct.

What about the Claimant’s other arguments?

[39] I understand that the Claimant disagrees with the employer’s policy and penalty imposed for a variety of reasons. She has provided information about how the Chief Executive Officer (CEO) was treated, her claim for wrongful dismissal, the breach of privacy rights and the employer’s failure to accommodate her.

[40] The court has stated that Tribunals have to focus on the conduct of the Claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the Claimant such that this would constitute unjust dismissal, but whether the Claimant was guilty of misconduct and whether this misconduct resulted in losing their employment.²⁹

²⁷ See GD3-51.

²⁸ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

²⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[41] The role of Tribunals is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.³⁰

[42] This means that I do not have the authority to decide whether the employer breached any of her rights as employee when they dismissed her, or whether they could have accommodated her in some other way.

[43] I have to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.³¹ Based on the facts of this case, I have decided that the Claimant's conduct does amount to willful misconduct.

[44] The Claimant's recourse against her employer is to pursue her claims in court, or any other Tribunal that may deal with these particular matters. I note that the Claimant has already hired a lawyer and has a mediation date with her employer.

Conclusion

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

[46] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

³⁰ See *Canada (Attorney General) v Caul*, 2006 FCA 251.

³¹ See *Canada (Attorney General) v Marion*, 2002 FCA 185.