



Citation: *DS v Canada Employment Insurance Commission*, 2022 SST 1388

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant (Claimant): D. S.

Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (462558) dated March 28, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: In person

Hearing date: August 17, 2022

Hearing participants: Appellant

Decision date: August 26, 2022

File number: GE-22-1438

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

Overview

[3] The Claimant lost her job as a Registered Practical Nurse on October 7, 2021. The Claimant's employer ("X") said the Claimant was let go because she didn't comply with their Covid-19 vaccination policy.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided the Claimant is disqualified from receiving EI benefits from October 31, 2021.

[5] The Commission says the Claimant was aware of the employer's vaccination policy and the date by which she needed to comply with the policy. The Commission further says the Claimant wilfully refused to be vaccinated knowing this would lead to a dismissal.

[6] The Claimant says she contracted Covid-19 in November 2020 (and again September 2021) and had a natural immunity to the virus. She further says she had a right to refuse the Covid-19 vaccine.

Matters I have to consider first

[7] Before the hearing commenced, the Claimant submitted nine-pages of new documents. I accepted the new documents as relevant, because they were related to the Claimant's health. I asked the Claimant to send the documents directly to the

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

Tribunal where they would be placed in the Appeal Record. The new documents have been listed as GD6-1 to GD6-9.

Issue

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

Analysis

[9] 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?

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

[11] The Commission says the reason the employer gave is the reason for the dismissal. The employer told the Commission that the Claimant was dismissed because she failed to comply to their vaccination policy by October 7, 2021.

[12] The Claimant doesn't dispute that she lost her job because she didn't comply with the employer's vaccination policy.

[13] I find the Claimant lost her job because she failed to comply with the employer's Covid-19 vaccination policy by October 7, 2021.

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

[14] The reason for the Claimant's dismissal is misconduct under the law.

[15] 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

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

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

[16] 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.⁵

[17] 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.⁶

[18] The Commission says there was misconduct because the Claimant was aware she could be dismissed if she didn't follow the employer's vaccination policy.

[19] The Claimant says there was no misconduct because she had natural immunity against Covid-19 and didn't need the vaccine.

[20] I find the Commission has proven there was misconduct, because they provided documentation from the employer that showed the date by which the Claimant needed to be vaccinated or be dismissed (GD3-26 to GD3-41). Furthermore, the Claimant confirmed during her oral testimony that she was aware of the employer's vaccination policy and made a personal decision not to comply with the policy. I realize the Claimant testified she previously contracted the Covid-19 virus and had natural immunity. Nevertheless, the employer didn't accept the Claimant's request for a medical exemption based on her view that she had natural immunity against the Covid-19 virus.

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.

Additional Testimony from the Claimant

[21] I realize the Claimant testified that she had a right to refuse the vaccination. Nevertheless, the only issue before me is whether the Claimant lost her job because of misconduct. The matter of whether the employer was unfair or unreasonable in adopting their vaccination policy was beyond jurisdiction. In short, other avenues existed for the Claimant to make these arguments.⁷

[22] I further recognize the Claimant testified that the employer refused her request for a religious exemption. I sympathize with the Claimant on this matter. Nevertheless, I agree with the Commission that the Claimant's individual belief didn't amount to a defined religious practice (GD4). Furthermore, the Claimant's employer did not accept the Claimant's request for a religious exemption from the vaccine.

[22] Finally, I recognize the Claimant provided medical documents to support her view she had self-immunity from the Covid-19 virus (GD6). Still, the only issue before me is whether the Claimant lost her job because of misconduct. In other words, I must apply the law to the evidence. In short, I cannot ignore the law even in the interest of compassion.⁸

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

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

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

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

Conclusion

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

[25] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division –Employment Insurance
Section

