



Citation: *TJ v Canada Employment Insurance Commission*, 2022 SST 1291

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: T. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (461078) dated March 19, 2022 (issued by Service Canada)

Tribunal member: Paul Dusome

Type of hearing: Teleconference

Hearing date: July 21, 2022

Hearing participant: Appellant

Decision date: August 8, 2022

File number: GE-22-1429

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 disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. The Claimant's employer said that she was let go because she refused to comply with a mandatory COVID-19 vaccination created by a Provincial Health Officer Order (Order), specifically by not disclosing her vaccination status.

[4] The Claimant says that the employer asked for access to all her health records. It was not fair or reasonable for the employer to change the terms of her employment contract. Compelled access to her personal health records was a violation of her civil and religious rights.

[5] 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 that the Claimant is disqualified from receiving EI benefits.

Issue

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

Analysis

[7] 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

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

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

Why did the Claimant lose her job?

[8] I find that the Claimant lost her job because she refused to comply with the COVID-19 vaccination Order by refusing to disclose whether she had received the vaccine or not. I see no evidence to contract this conclusion. The Claimant did not advance any evidence to show another cause for dismissal.

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

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

[10] 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

[11] 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

[12] 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

[13] The Commission says that there was misconduct because the Claimant was aware of the Order requirements and deadlines. She was also aware of 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.

consequences of non-compliance. She was aware of her right to seek an exemption from the requirement, but did not ask for one. The Commission concluded that on the facts of this case, misconduct had been proven.

[14] The Claimant says that there was no misconduct because she was let go because she would not allow access to her personal health records. That demand was a violation of her employment contract and of her civil and religious rights and freedoms.

[15] I find that the Commission has proven that there was misconduct, because the Claimant's non-disclosure of her vaccination status was wilful. That non-disclosure caused her dismissal. That non-disclosure was a breach of her obligations to the employer under the Order, as well as removing her from performing all her job duties. The Claimant was aware in advance of the consequences of non-compliance.

[16] The Claimant worked in long-term care homes and hospital settings provided by her employer. She was a member of a union, though grievances filed by the union over the COVID Order were going nowhere. Her work involved food service and housekeeping. During the pandemic, she had been working 60-hour weeks, often for multiple shifts, to help cover for staff shortages. She asked to work only at the care home, to avoid the spread of COVID between facilities. She had received excellent performance reviews.

[17] On August 12, 2021, the employer emailed employees about mandatory COVID-19 vaccinations for employees in long-term care and assisted living. This was based on a Provincial Health Officer Order putting the mandate into place that day. The Order required employees to be vaccinated with two doses of the vaccine by October 13, 2021. Until that date, employees had to wear personal protective equipment, and be regularly tested for COVID. Under the Order, employers had to collect vaccination status information from all employees and provide that information to the Provincial Health Officer.

[18] On September 24, 2021, the employer emailed employees with an update on the Order. The Provincial Health Officer had extended the deadline to be fully vaccinated

until October 26, 2021. Because of the extension, employees need to receive their first dose of the vaccine by September 27th, to qualify to receive the second dose by the deadline. The employer anticipated the requirement to be fully vaccinated by October 26th to be a condition of employment.

[19] On October 15, 2021, the employer emailed employees with another update. The Order had been posted online, accessible through the link in the email. The Order required all employees to have received at least one dose of the vaccine by October 26th in order to continue working. If an employee had not received their first dose before October 26th, they will not be permitted to work, on-site or remotely. They will be placed on unpaid leave. If they received their first dose between October 26th and November 15th, they will be able to return to work, with conditions. One of those conditions is confirming their vaccination status and immunization plan to their manager. The email stated that employees who have not received their first dose by November 15th “should anticipate that their employment...may be terminated.” The email concluded with explaining how to report their vaccination status, and how to request a medical exemption from the requirement.

[20] On October 26, 2021, the employer put the Claimant on unpaid leave. It gave her the opportunity to comply with the Order by November 15th to avoid dismissal.

[21] On November 18, 2021, the employer dismissed the Claimant for failure to comply with the COVID Order by the extended deadline of November 15, 2021. The letter reviewed the communications about the Order and the timelines. It also offered, if she became fully vaccinated in the future, to contact the employer to discuss her options.

[22] On February 14, 2022, the Commission notified the Claimant that she was not entitled to EI benefits from December 19, 2021, because she had lost her employment on October 25, 2021, for misconduct. The Claimant had applied for EI benefits on December 24, 2021. Based on the date of the application, December 19th was the earliest date the Claimant could have received EI benefits. That means that the period of suspension starting October 26th and ending November 17th, is not included in this

appeal. The issue of disentitlement from receiving EI benefits because of suspension for misconduct does not have to be considered.

[23] The employer supplied a copy of the Provincial Health Officer's Order. That copy is dated November 9, 2021. It also refers to varying a number of previous orders, dated from August 20 to October 25, 2021. This Order did confirm the deadlines and the requirement to report vaccination status outlined in the employer's emails of September 24th and October 15th. I have considered this copy of the Order, as it predates the dismissal on November 18th.

[24] The employer supplied a copy of its COVID-19 immunization requirement policy. It bears the approval date of December 1, 2021. There was no evidence of an earlier version of this policy. Since the employer dismissed the Claimant effective November 18, 2021, I have not considered this policy in reaching my decision.

[25] The Claimant confirmed that she was aware of the three email notifications from the employer about the vaccination requirement. She also had conversations and two Zoom meetings with managers about the vaccination requirements. She testified that she never gave her vaccination status to the employer. She did not apply for an exemption from the vaccination requirement.

[26] The Claimant testified that the employer required access to all her health records as part of the vaccination requirement. That was based on her testimony that the website for reporting vaccination, showed a lot of information, such as every prescription she had had. The report site had seven spaces for vaccination shots. I find no confirmation for that testimony. I do find evidence that contradicts it. The August 12th email from the employer states that the Order requires employers to collect vaccination status information from employees and provide it to the Provincial Health Officer. The September 24th email is silent on the subject of disclosing vaccination status. The October 15th email from the employer states that employees receiving their first dose of vaccine between October 26th and November 15th must disclose their vaccine status and immunization plan. The email directs employees to report on the employer's network in the "Employee Vaccine and Immunity Status report". The copy of

the Order in evidence says that employers must request proof of vaccination from all employees, and employees must provide proof of their vaccination. From those documents, it is clear that the only information that had to be disclosed was the Claimant's COVID-19 vaccination status, and if not fully vaccinated by October 26th, her plan to get the second dose. The number of spots for future shots is consistent with scientific uncertainty as to how many shots or boosters might be needed in the future. I do not accept the Claimant's testimony that the Order required access to all her personal health information.

[27] With that factual background, I must turn to assessing whether the Commission has proven that the Claimant was dismissed for misconduct.

[28] The Claimant in her documents and her conversations with the Commission, said that her civil and religious rights had been violated. She did not, in her documents, in her conversations with the Commission, or in her testimony, provide evidence or submissions in support of that claim. I therefore do not consider that claim in these reasons.

[29] *Wilfulness*. The Claimant agreed in her testimony that his element had been proven. It is clear from the evidence in her statements to the Commission, and in her testimony, that the Claimant chose not to disclose her vaccination status to the employer. That choice was wilfulness as defined for EI misconduct purposes.

[30] *Breach of obligation to the employer*. As a hospital and long-term care facility, the employer had a legal obligation under the Order to enforce mandatory COVID-19 vaccination and vaccination status disclosure (unless exempted or accommodated). The Order created an obligation on employees to comply with its requirements. The Claimant therefore had, as an employee of a health care facility, an obligation to comply with the Order. The Claimant's claim that this unilateral change to her employment contract had not been agreed to be her, and was illegal is not a factor I can consider. The remedy for that claim lies with the grievance procedure through her union, or with a court action. The evidence from the Claimant herself is clear and uncontradicted. She refused to disclose her vaccination status to the employer. That is the misconduct

alleged in this case. Her wilful refusal to comply with the Order was a breach of an obligation owed to the employer. The Order required the employer to obtain the vaccination status information from all employees, and report it to the Public Health Officer. Additionally, she knew that a suspension or dismissal would prevent her from performing all of her duties owed to the employer. She had the period from October 26th to November 15th to rectify the situation by getting the vaccine, reporting that to her manager, and thereby preserving her employment. She did not do so.

[31] *Awareness of consequences of non-compliance.* The Claimant stated that she did not know that she would be suspended or dismissed. That was based on the phrasing of the October 15th email from the employer: “Employees who have not received a first dose of COVID-19 vaccine by Nov. 15 should anticipate that their employment and/or other contractual arrangements with [employer] may be terminated.” She said that she did not think it meant that the employer would definitely fire her. She thought it was a bully tactic to force employees to get the vaccine. Her interpretation was wrong. In the face of the many warnings from the employer about the consequences of non-compliance with the Order, the Claimant remained non-compliant. The October 15th email said that if she had not received the first dose of the vaccine by October 26th, she “will be placed on unpaid leave”. The fact that she was placed on unpaid leave on October 26th indicates that this was not a mere bully tactic. The employer was serious. The phrase “may” in relation to termination does not change that. In testimony, the Claimant acknowledged that she knew the risk of being suspended or dismissed. The legal test is whether she knew or ought to have known about termination. I find that she knew or ought to have known that she faced suspension and dismissal for non-compliance with the Order.

[32] *Non-compliance caused the dismissal.* As found above, the non-compliance with the Order was the cause of the Claimant’s dismissal.

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

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

Conclusion

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

[35] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section