



Citation: *CH v Canada Employment Insurance Commission*, 2022 SST 1337

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

Decision

Appellant: C. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (471526) dated May 18, 2022 (issued by Service Canada)

Tribunal member: Nathalie Léger

Type of hearing: Videoconference

Hearing date: October 11, 2022

Hearing participant: Appellant

Decision date: October 16, 2022

File number: GE-22-2045

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant has been 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 Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. The Claimant's employer says that she was let go because she went against its vaccination policy: she didn't get vaccinated and didn't say whether she had been vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct. She says that the Commission, and the Tribunal, must evaluate the reasonableness of her employer's policy. She also argues that many factors point to the unreasonableness of the policy, and that if a policy is unreasonable, it is not misconduct to refuse to follow it.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. It also decided that the Claimant, in not following the policy, knew that she could be placed on leave. It finally decided that it did not have to consider the reasonableness of the policy. 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?

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

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 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. In that section, I will determine if it is the Commission's, or the Tribunal's, role to decide on the reasonableness of an employer's policy in a case of misconduct.

Why did the Claimant lose her job?

[9] Both parties agree that the Claimant was suspended from her job because she went against her employer's vaccination policy. I see nothing in the file or in the evidence provided at the hearing to make me believe this is not an accurate description of the events.

[10] Therefore, I find that the Claimant lost her job because she went against her employer's vaccination policy.

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

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

[12] The *Employment Insurance Act* (Act) doesn't say what misconduct means³. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant'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.

[13] Case law says that, to be misconduct under the Employment Insurance Act, two criteria must be met. First, the conduct has to be wilful. This means that the conduct

² See sections 30 and 31 of the Act.

³ It is important to note that even if the concept of misconduct is also found in other laws that apply in an employment relations context, it is not necessarily defined in the exact same way under all those laws.

was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[14] Second, to be misconduct under the Act, the Commission has to prove that 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.⁷

[15] The law doesn't say I have to consider how the employer behaved.⁸ I will come back into more details on this point later on in this decision. Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁹

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

[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.¹¹

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.

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.

[18] The Commission says that there was misconduct because

- the employer put in place a vaccination policy stating that all employees had to be fully vaccinated and disclose their vaccination status¹²;
- on October 6, 2021, the employer clearly notified employees, including the Claimant, about telling it whether they had been vaccinated by no later than October 29, 2021¹³;
- on the same date, the employer clearly notified the employees, including the Claimant, that those not vaccinated would be put on administrative leave ;
- the Claimant knew or should have known what would happen if she didn't follow the policy;
- the Claimant refused to share her vaccination status with the employer¹⁴;
- on November 15, 2022, the Claimant received a letter from her employer informing her she was put on administrative leave without pay, effective immediately, because she did not attest of her vaccination status as required by the policy.

[19] The Claimant says that there was no misconduct because the employer's vaccination policy was unreasonable and breached her right to privacy. She does not dispute the facts that she is not vaccinated and that she did not inform her employer of her vaccination status. She also did not dispute the fact that she was aware of the consequences for not respecting the policy. She said she wanted answers to her many questions before making a decision, but that she did not get them from her employer.

¹² GD6-37

¹³ GD6-39

¹⁴ GD4-7

Reasonableness of the Employer's Policy

[20] In her very complete and well-drafted submissions¹⁵, the Claimant states that the basis for her appeal is that misconduct cannot exist in the presence of an unreasonable policy¹⁶. She says that the case law¹⁷ relied on by the Commission does not apply to her case because the policy was not in question in that decision.

[21] I disagree with this argument because the main legal point in this decision is that the employer's conduct is not at all an issue to be considered in a misconduct case¹⁸. It flows from that conclusion that the reasonableness of an employer's policy is not an issue, *whether it is contested or not*. Two other Federal Court decisions make the same point¹⁹.

[22] She also argues²⁰ that the Commission, and therefore the Tribunal, must decide if the policy was reasonable because the Digest of Benefit Entitlement Principles (Digest)²¹ states that the reasonableness of the policy must be looked at in examining if a claimant's conduct amounts to misconduct. This is mentioned in the section on insubordination, and does not refer to any clearly binding decision by a superior court.

[23] The Digest is not binding on the Tribunal but can be used as an interpretative guide²², if and when the text of the Act or the jurisprudence is not clear on a specific point. It cannot be relied upon to overturn the recognized interpretation of a specific section of the Act²³.

¹⁵ GD6

¹⁶ GD6-5

¹⁷ *Paradis v. Canada (Attorney General)*, 2016 FC 1282

¹⁸ *Paradis v. Canada (Attorney General)*, 2016 FC 1282, at para 31

¹⁹ *Dubeau v. Canada (Attorney General)*, 2019 FC 725; *Houle v. Canada (Attorney General)*, 2020 FC 1157

²⁰ GD6-5

²¹ At s.7.3.2

²² *Canada (Attorney General) v. Talbot*, 2013 FCA 53 at para 14; *Canada v. Greey*, 2009 FCA 296, at para. 28

²³ *Sennikova v. Canada (Attorney General)*, 2021 FC 982 at para 60

[24] In this case, the binding decisions of the Federal Court²⁴ and the Federal Court of Appeal²⁵ are clear: the focus is on the employee's conduct, not on the employer's. This means that it is not the Tribunal's role to assess if an employer's policy is reasonable or just. The focus must remain on what the employee chose to do and on her knowledge of the consequences of that choice. The question of the reasonableness of the employer's policy is a question for labour arbitrator²⁶ or courts.

[25] Furthermore, the legal test for misconduct is an objective one. This means it is not focused on the reasons for acting in a certain way, but on the knowledge a claimant had of the possible consequences for her actions²⁷. The reasons that support an employee's decision to act in a way that does not align with an employer's policy is not relevant in deciding if a misconduct has been demonstrated by the Commission.

[26] Therefore, I conclude that the Tribunal should not – and cannot – look at the reasonableness of the employer's policy in evaluating the misconduct in this case.

Conclusion on misconduct

[27] I find that the Commission has proven that there was misconduct because

- the employer had a vaccination policy that clearly stated that employees had to disclose their vaccination status and be fully vaccinated by October 29, 2021;
- this policy was communicated to all employees on October 6, 2021;
- the Claimant sent questions to the employer regarding this policy so she could make an informed decision;

²⁴ *Paradis v. Canada (Attorney General)*, 2016 FC 1282, *Dubeau v. Canada (Attorney General)*, 2019 FC 725, *Houle v. Canada (Attorney General)*, 2020 FC 1157

²⁵ *Fleming v. Canada (Attorney General)*, 2006 FCA 16; *Canada (Attorney General) v. Lee*, 2007 FCA 406

²⁶ This is especially true when the Claimant argues that the policy must be unreasonable because it fails the *KVP* test – see GD6-11. This legal test was developed in the labour relations context and is not applicable in the interpretation of the Employment Insurance Act.

²⁷ *Canada (Attorney General) v. Lemire*, 2010 FCA 314 at para 15

- She discussed with her manager on October 29, 2021, about her non-compliance with the policy and was given until November 15, 2021, to comply;
- the Claimant knew or should have known the consequence of not following the employer's vaccination policy, because it was clearly stated in the policy.

[28] It is clear from the statements listed in the previous policy that the Claimant was aware of the employer's policy and of her obligations under it, that she was aware of the consequences of not respecting those obligations and that she still chose not to get vaccinated before the November 15 deadline.

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

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

[30] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated and to say whether she had been vaccinated was likely to cause her to lose her job.

Conclusion

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

[32] This means that the appeal is dismissed.

Nathalie Léger
Member, General Division – Employment Insurance Section