



Citation: *ML v Canada Employment Insurance Commission*, 2022 SST 1463

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

Decision

Appellant: M. L.
Representative: J. L.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (495433) dated July 21, 2022
(issued by Service Canada)

Tribunal member: Linda Bell
Type of hearing: Videoconference
Hearing date: October 27, 2022
Hearing participants: Appellant
Appellant's representative
Decision date: November 2, 2022
File number: GE-22-2934

Decision

[1] The appeal is dismissed. I disagree with the Appellant (Claimant).

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

Overview

[3] The Claimant worked as a food server at a senior's lodge, which falls under contract with provincial health services. The employer suspended and then dismissed her because she did not comply with their COVID-19 vaccination policy.

[4] The Claimant applied for regular EI benefits. The Commission decided the Claimant was not entitled to receive EI benefits because she lost her job due to her own misconduct. The Commission maintained its decision upon reconsideration.

[5] The Claimant disagrees with the Commission's decision. She appeals to the Social Security Tribunal (Tribunal). The Claimant says the Commission breached its contract to provide her EI benefits. She suffered an interruption of earnings and it was those earnings that are insured, not her employment contract or any policy. She says the Commission failed to provide her with the duty of care owed. She argues Service Canada acted directly against the terms of the contract, "by usurping the employer's authority and inserting itself into a reporting role" when advising the employer to use the code "N" on the Record of Employment (ROE).

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

Matters I have to consider first

Potential added party

[6] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Issue

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

Analysis

[8] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.²

[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 is no longer working for her employer. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[10] The employer told the Commission the Claimant had not complied with their vaccination policy so they placed her on unpaid leave as of December 1, 2021. The employer then dismissed the Claimant as of February 23, 2022.

[11] The Commission relied on the employer's statements and policy documents to support their decision that the Claimant was suspended and then dismissed due to her own misconduct.

² See sections 30 and 31 of the Act.

[12] The Claimant says she never agreed to be on a leave of absence or to lose her job. She says the employer prevented her from working. The Claimant says she was aware of the vaccination policy a few weeks before it came into effect. She says the employer tried to get her to sign a document about the policy but she refused.

[13] The Claimant explained in detail how, at first, the employer was following the dates set out by the provincial health service. When the provincial health services office pushed the compliance dates forward, she asked her employer to let her return to work. She says her manager finally gave her the shifts back and she continued working until November 30, 2021.

[14] The Claimant says that when the provincial health authority postponed the implementation of the policy for another two weeks, her employer refused to put her back on the schedule, refusing to allow her return to work. The employer told her they made the decision that all employees must be vaccinated against COVID-19. But she says a maintenance person was allowed to continue working, without being vaccinated.

[15] The Commission documented their April 14, 2022, conversation with the employer. During that conversation, the employer told the Commission they decided to maintain the policy that all staff in the health mandated buildings were required to be 100% vaccinated. The employer says it could not transfer the Claimant to one of their non-regulated buildings, like the maintenance person she referred to, because the Claimant worked as a food and beverage worker who served the residences in a health-mandated building.

[16] The Claimant argues she wasn't suspended because she still had access to their scheduling app. She says she didn't agree to be put off work and she didn't have an agreed upon return to work date.

[17] In the context of Employment Insurance, I find the employer suspended the Claimant and then dismissed her. She was not on a voluntary leave of absence

because she didn't agree to be on unpaid leave.³ Nor did she choose to leave her job voluntarily. So because the Claimant didn't agree to the unpaid leave of absence or voluntarily leave her job, I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances can be considered as a suspension and dismissal for failing to comply with the employer's vaccination policy.

What was the employer's policy?

[18] The employer implemented a COVID-19 vaccination policy (policy). A copy of the policy is included in the file. The policy was effective October 20, 2021.⁴

[19] The policy requires all employees be fully vaccinated from COVID-19 by November 30, 2021, and to provide proof of vaccination to the employer, unless they are granted an exemption.⁵

Was the policy communicated to the Claimant?

[20] The Claimant agrees the employer communicated the policy to her a few weeks before it came into effect. The policy states that reporting vaccination status was mandatory and there were deadlines for complying. All employees had to report whether they were vaccinated. If not vaccinated, they were required to submit a copy of the exemption approved by the employer.

[21] The Claimant says she sent an email to the employer to request a religious exemption. But the employer never answered her email. She did not request a medical exemption.

What were the consequences of not complying with the policy?

[22] The policy says, if the employee remains non-compliant with the policy, the employee will be placed on an unpaid Leave of Absence for the period of time required

³ Section 32 of the EI Act provides that in the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.

⁴ See the policy at pages GD3-21 to GD3-23.

⁵ See pages GD3-21.

to be fully immunized. This unpaid leave of Absence will commence December 1, 2021.⁶

[23] The documents on file also show that, in cases where the employee isn't granted an exemption, the policy requires all staff to be fully vaccinated against COVID-19, and report their vaccination status to their employer by November 30, 2021, in order to continue working.⁷

[24] The Claimant says she was aware the policy required her to report her vaccination status if she wasn't granted an exemption. She also knew she would be put on an unpaid leave and dismissed if she wasn't vaccinated. She confirmed receiving the employer's February 9, 2022, letter, regarding the requirement to be vaccinated before she could return to work.⁸ She says she chose not to respond to this letter. Then her employer dismissed her a few weeks later.

[25] When the Claimant failed to comply with the policy, the employer suspended her without pay, effective December 1, 2021. When she failed to respond to their February 9, 2022, letter, the employer dismissed the Claimant on February 23, 2022.

Were there exemptions provided in the policy?

[26] Yes. The policy provides for accommodation for employees who are unable to be vaccinated for "medical reasons or for any other protected ground under the Alberta Human Rights Act."⁹

[27] The Claimant said she sent an email requesting accommodation on a religious ground. She says the employer failed to respond to her request.

[28] The claimant argues the employer knew the provincial health authority was going to rescind the mandatory vaccination policy. However, on April 14, 2022, the Commission documented the employer told them that as of that date they were still

⁶ See page GD3-22.

⁷ See the policy at page GD3-21.

⁸ See page GD3-29.

⁹ See page GD3-22.

required to have 100% of their staff vaccinated, who worked in mandated buildings. The employer also said they did not know the provincial health authority was going to lift the restrictions as of March 1, 2022.¹⁰

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

[29] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[30] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.¹¹ Misconduct also includes conduct that is so reckless it is almost wilful.¹²

[31] The Claimant does not 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.¹³

[32] 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 there was a real possibility of being let go because of that.¹⁴

[33] The Commission has to prove the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show it is more likely than not the Claimant lost her job because of misconduct.¹⁵

[34] I find the Claimant willfully and consciously chose not to comply with the employer's policy. She knew the consequences of not complying would result in her suspension and dismissal.

¹⁰ See page GD3-25.

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹³ See *Attorney General of Canada v Secours*, A-352-94.

¹⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[35] The employer communicated the policy to the Claimant several weeks before it was effective on November 30, 2021. She received updates and was aware of when the provincial health authority extended the deadlines. The policy states that failure to comply with the policy would lead to the employee being placed on an unpaid Leave of Absence that will commence December 1, 2021.

[36] The employer wrote to the Claimant on February 9, 2022, stating, “In order for you to return to work, you will be required to be vaccinated for the coronavirus.” The letter also states the employer would be ending her leave of absence if she is not vaccinated because they “cannot permit unvaccinated individuals on the premises.” When the Claimant failed to reply to the employer’s letter, the employer dismissed her effective February 23, 2022.

[37] The Federal Court of Appeal has said the Tribunal has to focus on the conduct of the Claimant, not the employer. The question is not whether the employer was guilty of misconduct by suspending and then dismissing the Claimant such that this would constitute unjust dismissal. Instead, the question before me is whether the Claimant was guilty of misconduct and whether this misconduct resulted in losing her employment.¹⁶

[38] In this case, the Claimant made a deliberate choice not to comply with the employer’s policy. This conduct was a breach of the employer’s policy and she knew it would result in discipline, up to and including the employer placing her on an unpaid leave. She also knew that if she remained unvaccinated she would not remain on a leave of absence and would not be able to return to work.

[39] I recognize the Claimant provides several reference letters, which state she was an excellent worker and she loved her job. She says that calling her circumstances misconduct defames her and she wants her name cleared. But, as stated above, the

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

Court says misconduct does not need to have wrongful intent for her behaviour to be misconduct under the law.¹⁷

[40] I acknowledge the Claimant has a right to decide whether to be vaccinated, but she knew there were consequences if she refused to follow the employer's vaccination policy, which in this case was suspension and then dismissal from her employment. I also acknowledge the employer has a right to manage their day-to-day operations, which includes the authority to develop and impose policies at the workplace to ensure the health and safety of all their employees and clients.

[41] In this case, the Claimant has chosen not to be vaccinated against COVID-19 and refused to report her vaccination status, even though she knew it could get in the way of carrying out her duties toward her employer.

[42] The Claimant argues the employer imposed a policy she didn't agree too. She says she followed the contract she agreed to when she was hired. She says the employer disposed of her initial contract and imposed a new one which created a new job. I disagree because the duty owed to her employer was to comply with the vaccination policy, which was a condition of continued employment.¹⁸

[43] The undisputed facts are the employer provides residential accommodations to seniors, which falls under contract with the provincial health authority. The employer told the Claimant it implemented the policy in accordance with the requirements of their contract with the provincial health authority, requiring all employees to be vaccinated who do not meet the exemptions. The employer created its vaccine policy in its efforts to protect public safety and did so without distinction.¹⁹

[44] The purpose of the *Employment Insurance Act* is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of

¹⁷ See *Attorney General of Canada v Secours*, A-352-94.

¹⁸ See *MN v Canada Employment Insurance Commission*, AD-22-628.

¹⁹ See *Syndicat Northcrest v Amselem*, 2004 SCC 47.

employment that is insured against must be involuntary.²⁰ This is not an automatic right, even if a claimant has paid EI premiums.

[45] In my view, the Claimant did not lose her job involuntarily. This is because her non-compliance with the employer's policy is what led to her suspension and her dismissal. Based on my findings above, I find the Claimant lost her job because of misconduct.

Other arguments

[46] The Claimant disagrees with the employer's policy, her suspension, and dismissal for a variety of reasons. She asserts it was her earnings that were insured, not her job, employment contract, or any policy. She suffered an interruption of earnings, which she says is to be mitigated. She also says the Commission owes a duty of care to her and it usurped the employer's authority by inserting itself into a reporting role when it advised the employer to use the code "N" on the Record of Employment (ROE). She says the employer breached her human rights, contract law, etc.

[47] First, in response to the Claimant's argument that the Commission owed her a fiduciary duty, I am persuaded by a decision issued by the Federal Court.²¹ Although not exactly on point, in that decision the Federal Court found the Commission does not owe a claimant a fiduciary duty.

[48] Second, to be eligible for benefits, a claimant must first show they have suffered an interruption of earnings and have enough hours of insured employment.²² But in order to receive payment of benefits, there must not be any disqualifying or disentiing conditions.

²⁰ See *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

²¹ See *Berkiw v. Canada (Attorney General)*, 2018 FC 1228.

²² See section 7 of the Act.

[49] In this case, the Claimant was disentitled from receiving EI benefits during the period of suspension, due to misconduct. She was then disqualified from receiving EI benefits when she was terminated from her employment, due to misconduct.²³

[50] Regarding the Claimant's statement, that Service Canada usurped the employer's authority, by advising the employer to use the code "N" on the Record of Employment (ROE), it is not the ROE that determines whether there was misconduct or a disqualifying circumstance. Although the ROE may list a contentious reason for separation, the facts of the case are what leads to a finding of misconduct and disentitlement or disqualification from benefits.

[51] As stated in a recent Federal Court of Appeal decision, "There is no mechanism by which, this Court or the Social Security Tribunal can compel [the claimant's] employer to correct his ROE."²⁴

[52] The Federal Court of Appeal and Federal Court have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.²⁵

[53] I also considered the Federal Court of Appeal decision that states the role of the Tribunal is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.²⁶

[54] I do not have the authority to determine whether the employer's vaccination policy was unlawful. Equally, I do not have the authority to decide whether the employer breached any of the Claimant's rights as an employee when they suspended and dismissed her, or whether they could or should have accommodated her in some other

²³ See sections 31 and 30 of the Act.

²⁴ See paragraph [8] in *Vuong v Canada (Attorney General)*, 2021 FCA 221.

²⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

²⁶ See *Canada (Attorney General) v Caul*, 2006 FCA 251.

way. The Claimant's recourse against her employer is to pursue her claims in Court or any other tribunal that may deal with those particular matters.

[55] I have to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.²⁷ Based on the facts of this case, I already decided the Claimant's conduct amounts to wilful misconduct, as set out above.

Conclusion

[56] The Commission has proven the Claimant was suspended and later dismissed because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits.

[57] This means the appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

²⁷ See *Canada (Attorney General) v Marion*, 2002 FCA 185.