



Citation: *KR v Canada Employment Insurance Commission*, 2022 SST 1556

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

Decision

Appellant: K. R.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (475127) dated May 28, 2022
(issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Videoconference

Hearing date: October 12, 2022

Hearing participant: Appellant

Decision date: November 3, 2022

File number: GE-22-2071

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant isn't entitled to Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant's employer, a territorial government, placed her on an unpaid leave of absence from her job. Her employer said it did so because she didn't comply with their mandatory COVID-19 vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

[5] The Commission decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant isn't entitled to EI benefits.

Issues

[6] Did the Claimant voluntarily take leave or was she suspended from her job?

[7] Was the Claimant suspended from her job because of misconduct?

Analysis

Did the Claimant voluntarily take leave or was she suspended from her job?

[8] The Claimant was suspended from her job.

¹ Section 31 of the *Employment Insurance Act* (Act) says a claimant who is suspended from their job because of misconduct is disentitled from receiving benefits.

[9] The law deals with dismissal for misconduct and voluntarily leaving without just cause together.² This is because both refer to actions a claimant has taken that result in the loss of employment.³ The legal issue at stake for both is disqualification from receiving EI benefits.

[10] Sometimes it isn't clear if a claimant is unemployed because they were dismissed or because they voluntarily left their job. In cases like those, since the legal issue at stake for both is the same in the law, based on the evidence, the Tribunal can decide the grounds for disqualification.⁴

[11] In this case, in its initial decision, the Commission said it couldn't pay the Claimant EI benefits because she stopped working by voluntarily taking leave from her job. In its reconsideration decision, the Commission changed the reason. It now says it can't pay the Claimant EI benefits because she was suspended from her job.

[12] The Claimant said in her application for benefits that she stopped working because her employer put her on involuntary leave without pay. She said the employer did so because she didn't declare her vaccination status.

[13] The Claimant's employer issued a record of employment (ROE). The reason listed for issuing the ROE is "leave of absence". The employer told the Commission the Claimant is on leave without pay because she didn't want to attest to her vaccination status.

[14] I find that the question of whether a claimant has voluntarily taken leave from a job or if their employer has suspended them from their job by placing them on unpaid leave is like the question of voluntarily leaving without just cause versus dismissal. The difference in the two questions is that the issue at stake in the first is disentitlement. As noted above, the issue at stake in the second question is disqualification.

² See section 30 of the Act.

³ This reasoning appears in two Federal Court of Appeal decisions. See *Canada (Attorney General) v Easson*, A-1598-92; *Canada (Attorney General) v Desson*, 2004 FCA 303.

⁴ See *Canada (Attorney General) v Borden*, 2004 FCA 176,

[15] In this case, I find that the Claimant's employer placed the Claimant on an unpaid leave of absence. They didn't do so because she asked for leave, but because of an action she took. So, I don't find that the Claimant voluntarily took leave from her job; rather, I find the Claimant's employer suspended her from her job.

Was the Claimant suspended from her job because of misconduct?

[16] 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.⁵

[17] To answer the question of whether the Claimant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

– Why was the Claimant suspended from her job?

[18] I find that the Claimant was suspended from her job because she went against her employer's COVID-19 vaccination policy.

[19] The Claimant says her employer put in place a policy requiring employees to take the COVID-19 vaccine. The Claimant says she didn't declare her vaccination status. So her employer put her on a leave of absence.

[20] The Commission says the reason the employer gave is the reason for the suspension. The employer told the Commission that the Claimant stopped working because she didn't attest to her vaccination status.

[21] The Commission's file has a copy of the employer's COVID-19 vaccination policy. It says employees have to attest to their vaccine status or be placed on leave without pay.

[22] The Claimant doesn't dispute the Commission's submission concerning the reason she was suspended from her job. So I find that the Claimant was suspended

⁵ See sections 30 and 31 of the Act.

because she didn't declare her COVID-19 vaccination status. I accept her evidence as fact and find that she went against her employer's vaccination policy.

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

[23] The reason for the Claimant's suspension is misconduct under the law.

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

[25] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

[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.⁹

[27] The law doesn't say I have to consider how the employer behaved.¹⁰ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹¹

[28] 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

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See section 30 of the Act.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹² I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[29] The Commission has to prove that the Claimant was suspended from 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 was suspended from her job because of misconduct.¹³

[30] The Commission says there was misconduct because the Claimant went against her employer's mandatory COVID-19 vaccination policy.

[31] The Claimant says the laws in Canada allow people to make personal choices not to have medical interventions. She believes the vaccine mandate is coercion.

[32] The employer's vaccination policy says employees have to attest to receiving their first dose of the COVID-19 vaccine by midnight on November 30, 2021. If they don't, they will be placed on leave without pay starting December 1, 2021.

[33] In advance of the policy taking effect, the employer notified its employees on October 15, 2021 of the up-coming requirement to take the COVID-19 vaccine. It said that employees had until November 30, 2021 to get two doses of the vaccine.

[34] The Commission spoke to the Claimant's employer. The employer said notices were given to employees in September 2021 and that the Claimant's supervisor would have followed up with her. The employer said the policy allowed for exemptions.

[35] The Claimant told the Commission that she was aware of the employer's mandatory vaccine policy as of mid-October 2021. She said she knew that if she didn't show that she was vaccinated, she would be placed on a forced leave of absence as of

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹³ See *Minister of Employment and Immigration v Bartone*, A-369-88.

December 1, 2021. At the hearing, the Claimant confirmed that she got her employer's October 15, 2021 message.

[36] The Claimant sent the Tribunal a copy of an order in council concerning the *Public Services (COVID-19) Vaccination Regulation* signed on November 29, 2021. She argues that in spite of the employer's October 15, 2021 message, the actual policy didn't come out until a day before she had to attest to her vaccination status. The Claimant's witness added that employees weren't given a lot of time to respond to the policy because of when the order in council was signed.

[37] The Claimant submitted a copy of a decision of the General Division of the Tribunal.¹⁴ The Tribunal Member allowed the claimant's appeal. They found the claimant's employer verbally told the claimant of its vaccination policy two days before he had to be vaccinated against COVID-19 and that the Claimant didn't know he could be fired if he wasn't vaccinated.

[38] I find the circumstances surrounding the Claimant's suspension are different from those described in the decision. The OIC that made the policy of the Claimant's employer effective was signed on November 29, 2021. But the Claimant knew from the middle of October 2021 that her employer would require her to be vaccinated against COVID-19 by November 30, 2021. She also said she knew that she would be placed on a leave of absence if she didn't attest to taking the vaccine.

[39] Based on the above, I find the Claimant had just over six weeks notice of the requirement to take the COVID-19 vaccine and to attest to her vaccine status. And the notice was given in writing. But the Claimant said chose not to attest to her vaccine status. I accept this as fact.

[40] In her notice of appeal, the Claimant said that she supports the Justice Centre for Constitutional Freedoms' position that she has been illegally denied EI benefits because she was placed on involuntary leave without pay. I asked the Claimant about this. She

¹⁴ See pages GD9-393 to GD9-401.

referred to a letter written by a lawyer to the Minister of Employment and Social Development Canada.¹⁵

[41] The Claimant further explained that she doesn't believe that the Act clearly defines what misconduct is. She said there was no reason to accuse her of misconduct all of a sudden. She believes the decision to put her on leave without pay was harsh. The Claimant said that mandating vaccinations for employment goes against her rights under the *Charter of rights and Freedoms* (Charter).

[42] The Claimant is correct that the Act doesn't define misconduct. As noted above, case law defines what misconduct is. I have no reason to disbelieve the Claimant's testimony that she received high praise for her work performance. But I don't find that means her decision not to declare her COVID-19 vaccination status as required by her employer's policy doesn't constitute misconduct.

[43] The Claimant submitted several court decisions in support of her appeal. Most concern violations of the Charter. One is a labour arbitration decision concerning wrongful dismissal. Another concerns a distinction between two types of big box stores and the stage at which they could re-open during the pandemic. I don't find these decisions helpful to deciding if the Claimant's conduct constitutes misconduct.

[44] The Claimant also submitted a paper that discusses coordination of EI benefits and common law damages in the best interests of the unemployed. The Claimant referred to a portion of a quote in this paper.¹⁶ She talked about considerations for determining misconduct including the seriousness, whether it is an isolated incident and whether the employee has received warnings.

[45] The quote in the paper the Claimant submitted comes from a Federal Court of Appeal decision.¹⁷ The case was an appeal of a judgement of a lower court that decided an appellant was wrongfully dismissed. In the quote, the Court said that just cause for dismissal requires a broader inquiry than misconduct under the Act. The

¹⁵ See GD10.

¹⁶ See GD9-12.

¹⁷ See *Minott v O'Shanter Development Co. Ltd.* (1999), 42 OR (3d) 321.

Court then referred to several considerations to decide if an employer has just cause for dismissal. This is what the Claimant spoke of at the hearing. Again, I don't find this paper or the specific quote helpful in deciding if the Claimant's conduct constitutes misconduct under the Act. It's not my role to decide if the Claimant was wrongfully suspended from her job.

[46] The Commission says the Claimant made a personal choice not to comply with her employer's COVID-19 vaccination policy. I asked the Claimant about this. She testified that laws in Canada allow people to make personal choices about medical interventions. She again referred to the Charter.

[47] I understand that the Claimant and her witness don't believe the Claimant should have been placed on a leave of absence because she didn't attest to her vaccination status. She is effectively arguing that the employer's policy and her suspension under that policy amount to coercion and violate her rights protected by the Charter.

[48] The Tribunal is allowed to consider whether a provision of the Act or its regulations infringes rights that are guaranteed to a claimant by the Charter. But I am not allowed to consider whether an action taken by an employer violates a claimant's Charter fundamental rights. This is beyond my jurisdiction. So the Claimant would have to go to a different tribunal or court to address her concerns about her employer's actions.

[49] I find that the Claimant knew what she had to do under her employer's vaccination policy. I also find she knew what would happen if she didn't follow it. But, she made a personal decision not to attest to her vaccine status, which the employer's policy required her to do.

[50] I find that the Claimant's action, namely not attesting to her COVID-19 vaccination status was wilful. She made a conscious, deliberate, and intentional choice not to do so. She did so knowing that she would be placed on an unpaid leave absence. I have found that this means that she was suspended. For this reason, I find that the Commission has proven that there was misconduct.

So, was the Claimant suspended from her job because of misconduct?

[51] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

[52] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to attest to her vaccine status was likely to cause her to be suspended from her job.

Conclusion

[53] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[54] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section