



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 1571

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

Decision

Appellant: S. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (448867) dated February 7, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Videoconference

Hearing date: April 26, 2022

Hearing participant: Appellant

Decision date: April 28, 2022

File number: GE-22-632

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 be suspended from her job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant's employer placed her on an unpaid leave of absence from her job. She did not agree to the unpaid leave. The Claimant's employer said that she was placed on an unpaid leave because she did not comply with its COVID-19 vaccination policy. The employer later dismissed the Claimant from her job because she continued to not comply with the policy.

[4] Even though the Claimant doesn't dispute that this happened, the Claimant does not agree she should have been placed on a leave of absence or dismissed. The Claimant said her contract with her employer did not say she had to undergo an experimental medical treatment. She says because the employer imposed the leave of absence on her it should be considered a layoff and she should be able to receive EI benefits.

[5] The Commission accepted the employer's reason for the suspension. It first decided that the Claimant had taken a voluntary leave of absence from her job and could not be paid EI benefits for that reason. In its submissions to the Tribunal the Commission said the Claimant was actually suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

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

Matter I have to consider first

The Commission made an error

[6] The Commission initially decided that when the Claimant stopped working she had voluntarily taken a leave of absence without just cause.² It upheld that decision on reconsideration.³ The Commission submitted to this Tribunal that it was a mistake to say the Claimant was on a voluntary leave of absence. It said that the Claimant was actually suspended from her job due to misconduct.

[7] Where an error does not cause prejudice or harm, it is not fatal to the decision under appeal.⁴ Because the Commission's error did not prevent the Claimant from seeking reconsideration of the Commission's initial decision and later to appeal the reconsideration decision to this Tribunal, I find that the error does not cause the Claimant any prejudice or harm.

[8] However, the change in the reason for denying the Claimant EI benefits requires that I consider whether the Claimant took a voluntary period of leave without just cause or whether she was suspended from her job due to misconduct. My findings on this issue are below.

My jurisdiction is limited

[9] The Claimant was initially placed on a leave of absence (suspension) by her employer on October 8, 2021. She was later dismissed from her job on January 27, 2022.

[10] The appeal file shows the Claimant applied for EI benefits on October 21, 2021. The Commission has denied the Claimant EI benefits from October 17, 2021. That decision was based on the circumstances that existed when she first stopped working.

² See page GD3-31

³ See page GD3-53

⁴ *Desrosiers v. Canada (AG)*, A-128-89. This is how I refer to the Commission's decisions that apply to the circumstances of this appeal

The Commission reconsidered and upheld its original decision on the voluntary taking a period of leave.

[11] The Commission submitted to the Tribunal that the Claimant was indefinitely disqualified from receiving EI benefits effective January 23, 2022 because her dismissal was due to the Claimant's misconduct.⁵

[12] My jurisdiction, in other words my ability to make a ruling on an appeal, comes only after the Commission makes a decision on reconsideration that the Claimant then chooses to appeal. My jurisdiction is limited to reviewing the reconsideration decisions the Commission has actually made.

[13] Making a statement in a submission to the Tribunal that a disqualification is indefinite due to a later dismissal does not meet the requirements of the EI Act.⁶ Those requirements are that an initial decision be made and communicated to the claimant, and the claimant given an opportunity to request reconsideration of that initial decision. With respect to disqualifying the Claimant from receiving benefits due to her dismissal the Commission has not issued an initial decision or a reconsideration decision on that issue. This means I cannot make any decision on the dismissal issue.

[14] In this case, the Commission has only made an initial decision and reconsidered its decision to not pay the Claimant EI benefits from when she first stopped working in October 2021. So, I will issue a decision on the leave of absence issue only.

The employer is not an added party

[15] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

⁵ See page GD4-5 in the appeal file

⁶ Section 111 of the EI Act requires the Commission to rescind or amend a decision if new facts are presented. Section 112 of the EI Act says any person who is the subject of a Commission decision may request reconsideration of that decision and the Commission must reconsider its decision. Section 113 of the EI Act says a party who is dissatisfied with a reconsideration decision of the Commission may appeal to the Social Security Tribunal. I am paraphrasing the law for plain language purposes

[16] 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, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Issue

[17] Did the Claimant voluntarily take a period of leave without or was she suspended due to her misconduct?

[18] If the Claimant was suspended, was she suspended from her job because of her own misconduct?

Analysis

Did the Claimant take a voluntary period of leave or was she suspended?

[19] The EI Act sets out two very different sets of circumstances that may result in a claimant not being entitled to EI benefits. These are voluntarily taking a period of leave from your job or being suspended from your job due to misconduct.⁷

[20] It is not always clear whether a person became unemployed because they took a period of leave or they were suspended. Where the reasons for stopping work are not clear, the courts have said that I can decide whether the person became unemployed because they voluntarily took a period of leave or their employer suspended them due to misconduct. This is because it does not matter who took the initiative in ending the employment relationship when either reason, if proven, can result in a disentitlement to EI benefits.⁸

[21] The Claimant testified that she did not agree with taking a leave of absence from her employment. It was her employer's decision that she would not be able to work. The Claimant referred to paragraph 5, section 6.6.2 of the Digest of Benefit Entitlements

⁷ This is set out in Section 30 of the EI Act

⁸ See *Canada (Attorney General) v. Easson*, A-1598-92 and *Canada (Attorney General) v. Desson*, 2004 FCA 303

(Digest). The Claimant noted that section states that where an employer says an employee must take leave (without pay or reduced pay) then it is considered to be a layoff.

[22] The Digest is the Commission's policy. It is not law and I am not required to follow it. I do not think the Claimant was laid off from her employment. This is because the circumstances at the time the Claimant stopped working are not those of a layoff.

[23] I do not think that the Claimant voluntarily took a period of leave from her job. The law says that a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date.⁹ The Claimant testified that she did not agree to a leave of absence. She was not working because it was her employer who decided to place her on the leave. There was no date set for her return to work. This evidence tells me the Claimant did not voluntarily take a period of leave from her job.

[24] I think the Claimant was suspended from her job because it was her actions that led to her not working.

[25] The section of the law on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits (emphasis added).¹⁰

[26] The Claimant's employer issued a policy that required employees to be vaccinated against COVID-19. If they did not have an exemption to being vaccinated and did not receive the first dose of the vaccine by October 4, 2021 they would be placed on an unpaid leave of absence. The Claimant told her employer that she was not and would not be vaccinated. In response, her employer then placed her on an unpaid leave of absence. This evidence tells me it was the Claimant's actions that led to her employer not allowing her to work. As a result, I find the "unpaid leave of absence" is, for the purposes of the EI Act, a "suspension from work."

⁹ See section 32 of the EI Act

¹⁰ See section 31 of the EI Act

[27] I will now decide whether the Claimant was suspended from her job due to her misconduct.

Was the Claimant suspended from her job because of her own misconduct?

[28] 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?

[29] I find that the Claimant was suspended from her job because she did not comply with her employer's COVID-19 vaccination policy.

[30] The Claimant was employed in a health care facility on an information desk. Her employer brought in a new policy that required all employees had to submit to it evidence of at least one dose of the COVID-19 vaccine by October 4, 2021.

[31] On October 12, 2021, the Claimant's employer sent her an email saying that it had not received any evidence she had received at least one dose of the COVID-19 vaccine.

[32] The Claimant testified she was concerned about the effect the vaccine would have on her due to her existing medical conditions. The Claimant did not directly ask her employer for a medical exemption. The Claimant told her employer, by email, on October 14, 2021, that she decided not to get vaccinated at that time.

[33] The Claimant wrote in the same email "I do understand not taking the vaccine, as of today, Thursday October 14 I will be placed on a temporary unpaid leave of absence." The Claimant's employer replied to confirm that the Claimant was on a temporary unpaid leave of absence effective October 14, 2021. This evidence tells me the Claimant was suspended from her job because she failed to comply with the

employer's policy that she receive a first dose of the COVID-19 vaccine by October 14, 2021.

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

[34] Yes, the reason for the Claimant's suspension for misconduct under the law.

[35] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹¹ Misconduct also includes conduct that is so reckless that it is almost wilful.¹² 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.¹³

[36] 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 suspended or dismissed because of that.¹⁴

[37] 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.¹⁵

[38] The Commission says that there was misconduct because the Claimant was aware of the employer's mandatory vaccine policy and the consequences of non-compliance but chose not to comply with the policy before the deadline. The Commission noted the Claimant was not able to obtain an exemption. The Commission says the Claimant's argument that she worked with personal protective equipment for two years before the policy and that the employer punishing her now is not the issue under review.

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.

[39] The Claimant says that there was no misconduct because she has an auto-immune problem that results in inflammation. She was diagnosed a few years ago when she was very sick. She is able to treat her condition through diet. She said that she read the side effects reports put out by one of the vaccine makers. One of the side effects is inflammation. She did not want to put something in her body that she would not know the side effects of until after it was in her body.

[40] The Claimant did not request a medical exemption from the vaccine. She said her doctor told her to get the vaccination. She did not discuss the vaccination with her naturopath doctor. She also said that her medical condition did not fall within the medical exemption criteria of heart disease or an allergic reaction to the vaccine. She does say that her condition may lead to heart issues.

[41] The Claimant submitted that the mandate to get vaccinated was not from the government. Directive 6 was a suggestion from the provincial government that the employer put in place a policy. She said that the chief medical officer for the province said the policy was a suggestion that no one was to be fired. The Claimant said Directive 6 had options: vaccinate, regular testing, or participate in a class to learn about the benefits of vaccination. There was no requirement to fire people and she was fired.

[42] The Claimant argued that she had worked for two years using personal protective equipment. Canada has a health care system that does not require people to take treatment if they do not want the treatment.

[43] The Claimant said that it was not in her contract of employment that she was required to have a vaccination against COVID-19. The Claimant was a union member when she was working. She did file a grievance about the suspension and later dismissal. She has since withdrawn from the union and plans to pursue a claim against her employer with the help of a lawyer.

[44] The Claimant testified that she had seen the employer's COVID-19 Vaccination Policy.¹⁶ She agreed she was an employee covered by the policy. I asked the Claimant if she knew she could be suspended for not being vaccinated. The Claimant replied that she knew there was policy but hoped that it would not go this far.

[45] I find that the Commission has proven that there was misconduct, because it has shown that the Claimant made the conscious, deliberate and willful decision to not comply with the employer's policy when she was aware that not complying could lead to her being suspended or dismissed from her job. My reasons for this finding follow.

[46] The employer's policy required that all employees confirm that they had received at least one dose of the COVID-19 vaccine by October 4, 2021. The Claimant did not respond to the request by that date.

[47] On October 12, 2021, the Claimant's employer emailed her to tell her that she had until October 14, 2021 to show it that she had received at least one dose of the COVID-19 vaccine. The email said that if she did not receive a first dose by that date she would be placed on an unpaid leave of absence. In other words, she would be suspended.

[48] On October 14, 2021 the Claimant emailed her employer to say that she was not vaccinated against COVID-19 and that she was not getting vaccinated. In the same email she wrote "I do understand not taking the vaccine, as of today, Thursday October 14 I will be placed on a temporary unpaid leave of absence." This evidence tells me that the Claimant was aware of the requirements of the employer's policy and that she could be suspended for not complying with those requirements.

[49] The Claimant chose not to get vaccinated by October 14, 2021 as required by her employer's policy. This evidence tells me the Claimant made the conscious, deliberate and willful decision to not get vaccinated when she knew that by doing so she could be suspended from her job. As a result, I find that the Commission has proven

¹⁶ The employer's policy is at pages GD3-55 to GD3-62 of the appeal file.

that the Claimant was suspended from her job due to misconduct within the meaning of the law and case law described above.

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

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

Other Matters

[51] The Claimant argued that her employer changed the reason for issuing the Record of Employment (ROE) from Leave of Absence to Dismissal and that it was required to fill out the comments section on the ROE.

[52] An employee can stop working for any number of reasons. Whether the words “Leave of Absence” or “Suspension” appears on the ROE is not determinative of whether the Claimant is entitled to receive EI benefits. The employer’s later amendment of the ROE to show that she was dismissed and the lack of comments in section 18 is also not determinative of the matter. What is determinative, and what I have to consider, are the circumstances that existed at the time Claimant stops working.¹⁷

[53] The Claimant said that her employer’s policy went beyond what the provincial government suggested. She said that the provincial government did not require that people be fired. I note that in cases for a disqualification from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant’s act or omission and the conduct of the employer is not a relevant consideration.¹⁸

[54] Accordingly, it is not necessary for me to evaluate whether the employer’s policy exceeded the suggestions of the provincial government, for me to make a determination on the issue of whether the Claimant was suspended due to her own misconduct.

¹⁷ *Canada (Attorney General) v. Lamonde*, 2006 FCA 44

¹⁸ *Paradis vs. Canada (Attorney General)*, 2016 FC 1282

[55] The Claimant argued that it was a matter of human rights that she be able to work and to have an income. She said that she needed to receive EI while she was looking for another job. She has been affected emotionally and financially by the loss of her job.

[56] Employment insurance is not an automatic benefit. And, like any other insurance scheme, you must meet certain requirements to qualify. The Commission has proven that the Claimant was dismissed from her job because of misconduct. This means that the Claimant is disqualified from receiving benefits.

Conclusion

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

[58] This means that the appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section