



[TRANSLATION]

Citation: *AD v Canada Employment Insurance Commission*, 2022 SST 1454

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

Decision

Appellant: A. D.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (490512) dated July 5, 2022
(issued by Service Canada)

Tribunal member: Manon Sauvé
Type of hearing: In person
Hearing date: November 23, 2022
Hearing participant: Appellant
Decision date: December 9, 2022
File number: GE-22-2683

Decision

[1] The appeal is allowed in part.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct for the period from October 15, to December 22, 2021. This means that the Claimant is disentitled from Employment Insurance (EI) benefits.¹

[3] However, as of December 23, 2021, the Commission hasn't proven that the Claimant was suspended because of misconduct. This means that the Claimant is entitled to benefits from that date.

Overview

[4] The Claimant works as a chef for her employer who provides food services in a seniors' residence.

[5] The employer told its staff that they would have to comply with Quebec's vaccination policy for health and social services employees. Employees who didn't get vaccinated would be suspended. They would not have access to the facilities to offer their service.

[6] On October 16, 2021, the Claimant was suspended for failing to comply with her employer's vaccination policy. She didn't provide proof of vaccination as required by the order.

[7] On January 24, 2022, the Claimant applied for EI benefits. The Commission refused to pay her benefits because she was suspended for misconduct. She knew or should have known that she would be suspended for not complying with her employer's vaccination policy.

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

[8] The Claimant disagrees with the Commission. The government has extended the period to comply with the vaccination policy. In addition, non-vaccinated employees had to pass screening tests and obtain negative results to be able to work. The employer misinterpreted the amendments to the order in refusing to allow her back to work. So, she didn't commit misconduct.

Issue

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

Analysis

[10] 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?

[11] The Claimant works as a chef for a company that prepares meals in a seniors' residence.

[12] The Government of Quebec adopted various measures to counter the COVID-19 pandemic. Among other things, it adopted an order that applies to people working in Quebec's health and social services sector. It isn't disputed that the measures apply to the Claimant.

[13] In the first order adopted, the government gave those affected until October 15, 2021, to comply with the vaccination policy. People had to provide evidence that they were fully vaccinated or would soon be vaccinated. Otherwise, they would be suspended without pay.

[14] It was in this context that the Claimant was suspended without pay on October 16, 2021, by her employer.

[15] She doesn't dispute that that is the reason why she was suspended.

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

[16] 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 for her behaviour to be misconduct under the law.⁴

[17] 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 because of that.⁵

[18] 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 because of misconduct.⁶

[19] I accept that the Claimant works as a chef for a social economy enterprise, which offers, among other things, food preparation services at seniors' residences. She carries out her duties in one of the residences served by her employer.

[20] As I mentioned earlier, in the context of the COVID-19 pandemic, the Government of Quebec adopted various measures to ensure the health and safety of Quebecers.

[21] On September 24, 2021, the order was adopted requiring health sector employees to provide a vaccine passport.

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 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.

[22] I accept that the Claimant was told about her employer's vaccination policy. She was given more time to comply. She didn't provide proof of her vaccination before October 15, 2021, as required by her employer.

[23] On October 13, 2021, the government postponed the vaccination policy for the health sector employees until November 15 2021. The Claimant's employer told her on October 15, 2021, that employees who decided not to get vaccinated and not to go back to work would be on leave without pay from October 15, 2021, to November 14, 2021.⁷

[24] She didn't have access to the seniors' residence. According to the evidence, the Claimant's employer is a member of the cooperative network *Entreprise d'économie sociale en aide à domicile* [domestic help social economy enterprise] (EÉ SAD).⁸ On October 15, 2021, it received the Government of Quebec's vaccination policy guidelines. The guidelines indicated that the vaccine passport was mandatory for people wanting to access, among other things, private seniors' residences.⁹

[25] As of December 23, 2021, the government amended the order by relaxing certain rules. For example, people who had to go into a health facility for their work could enter if they had a negative COVID-19 test within the last 72 hours.¹⁰

[26] The Claimant says that, based on those changes, she should have been able to test every three days like health care staff because she worked in a seniors' residence.

[27] In addition, she considers the policy illegal and unfair. It prevented her from earning a living. Even Premier Legault said in a public statement that people should not be deprived of their income. It was after this statement that she applied for EI benefits.

[28] I point out that, despite the government's changes to the order, the employer continued the Claimant's suspension because it considered that she had visitor status when she went to work. At least that was the employer's interpretation of the

⁷ GD3-22.

⁸ This network brings together domestic help social economy enterprises.

⁹ GD3-23.

¹⁰ GD3-38.

government's vaccination policy. In reality, her employer has a subcontract for meal preparation in the seniors' residence. It had to follow the vaccination policy for staff providing services in the facility.

[29] The Claimant therefore has to comply with the vaccination policy that applies to her status, namely, to provide her vaccine passport showing that she is fully vaccinated.¹¹ I am of the view that she doesn't correspond to the definition of health care staff covered under the Government of Quebec's easing of rules on October 13, 2021, because she wasn't working for the health network, but for a subcontractor.

[30] In those circumstances, I consider that, by refusing to get vaccinated, the Claimant didn't comply with her employer's vaccination policy, which was necessary to have access to the seniors' residence. She knew that she would be suspended for not providing proof.

[31] In *Nelson*,¹² the Federal Court of Appeal reiterated that an objective assessment must be applied as required by the Act. Indeed, "there will be misconduct where the claimant knew or ought to have known that [their] misconduct was such as to impair the performance of the duties owed to [their] employer and that, as a result, dismissal was a real possibility." This is the Claimant's case for the period from October 15, 2021, to December 22, 2021. The rules in effect required her to be vaccinated to work.

[32] Now, as of December 23, 2021, the government has amended the order by relaxing certain rules concerning, among others, people who have to go into facilities affected by the order to carry out their duties. This is the case of the Claimant, who has to go into a seniors' residence to carry out her duties. So, if she shows a negative COVID-19 test within the last 72 hours,¹³ she can perform her duties in the seniors' residence kitchens.

¹¹ GD3-29.

¹² *Nelson v Canada (Attorney General)*, 2019 FCA 222 (CanLII) at para 25 [sic].

¹³ GD3-38.

[33] I note that, despite the easing of rules, the employer continued the Claimant's suspension.¹⁴

[34] I find that, from that point on, the Claimant was no longer going against the employer's policy. So, the Commission could not conclude that this was misconduct, since she was no longer going against the employer's policy allowing its employees access to facilities by providing, among other things, a negative COVID-19 test.

[35] The Commission hasn't proven that the Claimant refused to take the tests, which would have been misconduct under the Act.

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

[36] Based on my findings above, I find that the Claimant was suspended from her job from October 15, 2021 to December 22, 2021, because of misconduct.

[37] However, as of December 23, 2021, the Claimant wasn't suspended from her job because of misconduct.

Conclusion

[38] The Commission has proven that the Claimant was suspended from her job because of misconduct from October 15, 2021, to December 22, 2021. Because of this, the Claimant isn't entitled to EI benefits during this period.

[39] The Commission hasn't proven that the Claimant was suspended because of misconduct from December 23, 2021. Because of this, she is entitled to EI benefits.

[40] This means that the appeal is allowed in part.

Manon Sauvé
Member, General Division – Employment Insurance Section

¹⁴ GD3-40.