



Citation: *AP v Canada Employment Insurance Commission*, 2022 SST 1497

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

Decision

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

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (469949) dated May 20, 2022 (issued by Service Canada)

Tribunal member: Linda Bell
Type of hearing: Teleconference
Hearing date: November 7, 2022
Hearing participant: Appellant
Decision date: November 15, 2022
File number: GE-22-1878

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant worked as a supply attendant in materials management at a hospital. The employer placed her on an involuntary leave without pay (suspended her) because she did not comply with their COVID-19 vaccination policy. The Claimant applied for regular EI benefits.

[4] The Commission decided the Claimant was not entitled to receive EI benefits because she was suspended due to her own misconduct. The Claimant disagrees with the Commission's decision. She appealed to the Social Security Tribunal (Tribunal).

[5] The Claimant says she did not agree to be put on an unpaid leave and did not voluntarily leave her job. She argues the vaccination policy was not part of her employment contract, which she has grieved through her union. The Claimant says her employer discriminated against her, blackmailed her, and their actions are criminal. She asserts the employer's actions of trying to force her to vaccinate against COVID-19 were harassment, coercion, and violated her informed consent.

¹ Section 30 of the *Employment Insurance Act* (EI 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, 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 was suspended because of misconduct, I have to decide two things. First, I have to determine why the Claimant is not working for her employer. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended?

[10] The employer told the Commission the Claimant had not complied with their COVID-19 vaccination policy so they placed her on an unpaid leave as of November 1, 2021.

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

² See sections 30 and 31 of the EI Act.

[12] The Claimant agrees the employer suspended her when she did not comply with their vaccination policy. She says she has all the versions of the employer's vaccination policy, including the September 22, 2021, version.

[13] The Claimant argued the employer initially said they based their policies on the provincial health directive #6. But when the province lifted those mandates, the employer decided to maintain their vaccination policy. She says she acted deliberately but her actions are not misconduct because she believes the employer's actions of maintaining the policy are not reasonable. So she thinks her actions could be insubordination but not misconduct. The Claimant remains an employee but cannot return to work unless she is fully vaccinated against COVID-19.

[14] 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 did not agree to be on unpaid leave.³ Nor did she choose to leave her job voluntarily.

[15] So because the Claimant didn't agree to the 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 a suspension for failing to comply with the employer's vaccination policy.

– **What was the employer's policy?**

[16] The employer implemented a COVID-19 Vaccination Policy (policy). A copy of the policy is included in the file. The policy was effective September 22, 2021.⁴

[17] The policy requires all employees be fully vaccinated from COVID-19 by October 31, 2021, and to provide proof of vaccination to the employer, unless they are granted an exemption.⁵

³ Section 32 of the EI Act provides a voluntary period of leave require 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 GD3-53 to GD3-59.

⁵ See pages GD3-57 and GD3-22.

– **Was the policy communicated to the Claimant?**

[18] The Claimant agrees the employer communicated all versions of the policy to her. She confirmed she received the September 22, 2021, version. 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. The Claimant says she did not submit a request for exemption for medical or on any human rights ground.

– **What were the consequences of not complying with the policy?**

[19] The policy says effective November 1, 2021, all unvaccinated staff, without a valid medical contraindication or other reasonable exemption pursuant to the *Ontario Human Rights Code* will be placed on an unpaid leave of absence.⁶

[20] The Claimant says she was aware the policy required her to report her vaccination status if she wasn't granted an exemption. The policy reporting process required her to provide documentation from her employer of an approved exemption or proof of vaccination.

[21] 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 1, 2021, in order to continue working.⁷

[22] When the Claimant failed to comply with the policy, the employer suspended her effective November 2, 2021. I recognize the Record of Employment says her last day paid was November 3, 2021. The Claimant says her last day worked was November 1, 2021. So I accept her suspension was effective November 2, 2021.

⁶ See page GD3-57.

⁷ See the policy at page GD3-57.

– **Were there exemptions provided in the policy?**

[23] Yes. The policy provides for exemptions for employees who are unable to be vaccinated for medical reasons or on human rights grounds.⁸ The Claimant said she did not apply for an exemption because Human Resources told her they were not granting any.

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

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

[25] To be misconduct under the law, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.⁹ Misconduct also includes conduct that is so reckless it is almost wilful.¹⁰

[26] 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.¹¹

[27] 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.¹²

[28] The Commission has to prove the Claimant was suspended 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 was suspended because of misconduct.¹³

⁸ See page GD3-55.

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

¹⁰ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹¹ See *Attorney General of Canada v Secours*, A-352-94.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

[29] 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.

[30] The employer began communicating the policy to the Claimant on August 16, 2021. The Claimant also received numerous updates and communications from her employer. The employer clearly told her, if she failed to be fully vaccinated by November 1, 2021, she would be in contravention of the policy. The policy also states that failure to comply with the policy would lead to discipline, up to and including the employer placing her on an unpaid leave of absence (suspension).¹⁴

[31] 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 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 her being suspended from her employment.¹⁵

[32] 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 (suspending her) from her employment.

[33] 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 vaccination policy, which in this case was suspension 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.

¹⁴ See page GD3-57.

¹⁵ See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

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

[35] The undisputed facts are the employer is a hospital providing health care services. The employer told the Claimant it implemented the policy in accordance with the requirements of Directive 6, requiring all employees to be vaccinated who do not meet the exemptions. The employer maintained its vaccine policy after the provincial mandates were lifted in its continued efforts to protect public safety and did so without distinction.¹⁶

[36] The purpose of the EI Act is to compensate persons whose employment stops involuntarily and who are without work. The loss of employment that is insured against must be involuntary.¹⁷ This is not an automatic right, even if a claimant has paid EI premiums.

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

– **Other arguments**

[38] The Claimant disagrees with the employer's policy, the coding on her ROE, and her suspension. She says the policy didn't allow her to provide informed consent. She asserts she was discriminated against, the policy was unreasonable, the employer's actions were criminal, etc.

[39] The Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law

¹⁶ See *Syndicat Northcrest v Amselem*, 2004 SCC 47.

¹⁷ See *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

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.¹⁸

[40] The Federal Court of Appeal has also said the role of the Tribunal is not to determine whether a dismissal, or in this case a suspension, by the employer was justified or was the appropriate sanction.¹⁹

[41] To be eligible for benefits, a claimant must first show they have suffered an interruption of earnings and have enough hours of insured employment.²⁰ But in order to receive payment of benefits, there must not be any disqualifying or disentitling conditions. In this case, the Claimant was disentitled from receiving EI benefits during the period of suspension.²¹

[42] The Claimant argued her employer listed the code "K" on the Record of Employment (ROE), and not "M" for misconduct. The code on the ROE is not what determines whether a claimant's misconduct caused the loss of employment. Instead, the facts of the case are what leads to the determination of misconduct and disentitlement from benefits.

[43] 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 her, or whether they could or should have accommodated her in some other way. The Claimant's recourse against her employer is to pursue her claims through her union, in Court, or any other tribunal that may deal with those particular matters.

¹⁸ 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.

¹⁹ See *Canada (Attorney General) v Caul*, 2006 FCA 251.

²⁰ See section 7 of the EI Act.

²¹ See sections 31 of the EI Act.

[44] I have to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.²² Based on the facts of this case, I already decided the Claimant's conduct amounts to willful misconduct, as set out above.

Conclusion

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

[46] This means the appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

²² See *Canada (Attorney General) v Marion*, 2002 FCA 185.