



Citation: *JG v Canada Employment Insurance Commission*, 2022 SST 1487

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

Decision

Appellant: J. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (485118) dated June 14, 2022 (issued by Service Canada)

Tribunal member: Marc-André St-Jules

Type of hearing: Videoconference
Hearing date: October 12, 2022
Hearing participant: Appellant

Decision date: October 31, 2022
File number: GE-22-2309

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

Overview

[3] The Claimant lost her job. The Claimant's employer says that she was let go because she went against its vaccination policy: she didn't get vaccinated.

[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 accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

Matter I have to consider first

The Claimant has two appeals before the Tribunal and separate decisions are being issued for each one

[6] I have two separate appeals before me with the same Claimant. I am writing separate decisions for each appeal. This current decision deals with a misconduct disqualification. The other decision will be issued separately. To minimize the Claimant's time and avoid delays, I scheduled one hearing for both issues.

[7] I find the Claimant is not prejudiced by having two separate decisions. Each appeal raises a separate issue that is independent from the other, so having two

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

separate decisions makes each of them clearer and more concise. It also allows the Claimant to appeal either decision if she so chooses.

I accepted a document received after the hearing

[8] The hearing was held on October 12, 2022. On October 25, 2022, the Claimant sent in an unsolicited document regarding a Vaccine Religious Exemption Request. The document is relevant to the issue under appeal. The document was shared with the Commission. In the interest of natural justice, I considered the document.

Issue

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

Analysis

[10] 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.²

[11] 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 lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose her job?

[12] I find that the Claimant lost her job because she went against her employer's vaccination policy.

[13] The Claimant says she was dismissed as she did not comply with the vaccination policy. Regarding her departure, there was an agreement between the employer and the Claimant. The agreement was that the departure would be communicated as a retirement. The Claimant testified that the true reason has always been the vaccine policy and its requirements.

² See sections 30 and 31 of the Act.

[14] The Commission says the Claimant was dismissed as she failed to comply with the employer's vaccination policy. The Claimant refused to be vaccinated.

[15] I find that the Claimant was dismissed as she did not comply with the vaccine policy implemented by her employer. The Claimant and the employer have been consistent with their positions on this. The only mention of retirement on file has been explained and I have determined it is not a case of retirement.

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

[16] The reason for the Claimant's dismissal is misconduct under the law.

[17] 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 dismissal 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.

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[19] 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.⁶

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

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

[20] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁸

[21] 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 wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.⁹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[22] The Commission has to prove that the Claimant lost 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 lost her job because of misconduct.¹⁰

[23] The Commission says that there was misconduct because:

- The employer had a vaccination policy.¹¹
- The employer notified the Claimant about its expectations about getting vaccinated.
- The employer communicated the policy to the Claimant / spoke to the Claimant several times to communicate what it expected.
- The Claimant knew or should have known what would happen if she didn't follow the policy.

⁷ See section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹¹ See GD3 page 38. The policy required everyone to be fully vaccinated by November 15, 2021.

[24] The Claimant says that there was no misconduct because:

- Every Canadian has a basic freedom to choose or refuse medical treatment.
- Section 7 of the *Canadian Charter of Rights and Freedoms* has right to liberty and security of the person.
- Denying benefits solely on the basis of what medical treatments employees choose does not accord with the principles of natural justice.
- Covid-19 vaccines do not prevent infection or transmission.
- During executive leadership meetings,¹² it was made perfectly clear that all religious exemption requests would be denied. This was consistent from the drafting of the policy all the way until the Claimant herself being told not to bother submitting her request for exemption.
- The Claimant was devoted to the employer up to and including her last day. The Claimant testified this can't be interpreted as misconduct. The bar for misconduct has not been met.
- COVID-19 vaccines go against her religious beliefs.
- During the pandemic, the Claimant worked from home more than 50% of the time. The Claimant's request to work from home full time as an alternative was denied.
- The employer never suggested there was any cause for her termination.
- The Claimant complied with all requirements such as testing and masking.
- The new policy was not part of her employment contract.
- The Claimant paid into the employment insurance fund for 45 years.

¹² The Claimant herself was part of the executive leadership team.

[25] The employer's vaccination policy says that all existing employees who are not fully vaccinated must attend an educational session. The Claimant testified she did attend. Her position on vaccines did not change subsequent to the educational session.

[26] The policy says that by November 15, 2021, all employees must be fully vaccinated unless they have a medical exemption or an approved exemption under the Ontario Human Rights Code. The policy also states that failure to comply with this policy may ultimately result in the cessation of employment.

[27] The Claimant met with the president and CEO of the organization to discuss the vaccine policy. Following this, an agreement was reached regarding the Claimant's departure from the organization. A letter addressed to the Claimant from the President and CEO dated October 27, 2021, outlines the agreement.¹³ One paragraph from the letter is copied below:

Following our meetings on October 5 and 7, 2021, as well as our subsequent exchanges, we are writing to confirm the arrangements for your departure. This has become necessary pursuant to the introduction of the (employer name) mandatory vaccination policy based on Directive #6.....

[28] The meeting and subsequent exchanges referenced above support the Claimant was aware of the policy. The Claimant testified that she knew the consequences of not complying but was always hopeful the actual implementation would not occur. The Claimant was part of the executive with her employer. This meant the Claimant was part of the team which approved the vaccine policy with the employer.

[29] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said unvaccinated individuals could face the cessation of the employment relationship.

¹³ See GD2 page 15.

- The Claimant was part of the discussions to establish the policy and voted against the adoption.
- The Claimant met with the employer regarding the policy and was part of the executive team implementing the policy.
- The Claimant therefore knew or should have known the consequence of not following the employer's vaccination policy.

[30] I find the Claimant is very credible. Her statements were consistent and nothing from the Commission suggests any credibility issues. I have no doubt that the Claimant was a valuable employee. The fact that she was promoted to a very senior role in the organization supports this conclusion.

[31] The Claimant says that the threshold for misconduct has not been met. She followed her beliefs and was a productive employee who contributed until her last day at work. I accept the Claimant never had any wrongful intent. Nothing in the file suggests this and I am confident this is the case. However, the courts have ruled over the years that a person does not have to have wrongful intent for there to be misconduct.¹⁴

[32] I find that once the employer imposed the vaccination policy, this became a fundamental condition of employment. I agree that the Claimant can decline vaccination. That is her own personal decision. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace.

[33] The Claimant references other laws and argues that her rights were violated under those laws.¹⁵ My role is to make decisions based on the EI Act, Regulations and

¹⁴ See *Caul v Canada (Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.

¹⁵ The Claimant included a letter from The Justice Centre for Constitutional Freedoms which mentions Charter rights and court cases mentioning the right to bodily integrity.

related case law. The Claimant may have recourse under other forums but my jurisdiction is limited as stated above.

[34] By choosing not to be vaccinated after failing to persuade her employer to accommodate her, she made a personal decision that led to the foreseeable consequences for her employment.

[35] The Tribunal's Appeal Division has confirmed that it doesn't matter if that decision is based on religious beliefs, medical concerns or privacy considerations. The act of deliberately choosing not to comply with a workplace COVID-19 safety policy is considered wilful and will be misconduct or purposes of the EI Act.¹⁶

[36] I understand that the Claimant feels that because she paid into the employment insurance fund, she should be entitled to financial support. This belief goes against the fundamental principle of employment insurance. This is that an employee must not voluntarily place herself in a position of unemployment. This is what the Claimant did in this case. This conscious and deliberate breach of the duty owed to the employer is misconduct under the Act.

So, did the Claimant lose her job because of misconduct?

[37] Based on my findings above, I find that the Claimant lost her job because of misconduct.

[38] This is because the Claimant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

¹⁶ See: *SP v Canada Employment Insurance Commission*, 2022 SST 569 .

Conclusion

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

[40] This means that the appeal is dismissed.

Marc-André St-Jules
Member, General Division – Employment Insurance Section