



Citation: *SM v Canada Employment Insurance Commission*, 2023 SST 27

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: S. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (462548) dated April 6, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Videoconference

Hearing date: December 22, 2022

Hearing participant: Appellant

Decision date: January 3, 2023

File number: GE-22-3509

Decision

[1] I am dismissing the appeal, with modification. I disagree with the Appellant (Claimant).

[2] The Canada Employment Insurance Commission (Commission) has shown the Claimant was suspended and then lost her job because of misconduct (in other words, because she did something that caused her to be dismissed). This means the Claimant is disentitled from Employment Insurance (EI) benefits during the period of her suspension from October 18, 2021, to October 29, 2021.¹ She is disqualified from EI benefits as of October 30, 2021, the effective date of dismissal.²

Overview

[3] The Claimant worked as a clerk at a children's hospital. The employer put her on unpaid leave (suspended her) and then dismissed her because she did not comply with their 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 accepted the employer's reason for the dismissal. It decided the Claimant lost her job because of misconduct. Because of this, the Commission decided the Claimant is disqualified from receiving EI benefits.

[6] The Claimant disagrees with the Commission's decision to deny her EI benefits. She appealed to the Social Security Tribunal (Tribunal) General Division.

[7] On September 6, 2022, a Member of the Tribunal's General Division (GD) summarily dismissed the Claimant's appeal. The Claimant appealed the GD's decision to the Tribunal's Appeal Division (AD). The AD Member found the GD Member made an

¹ See section 31 of the *Employment Insurance Act* (Act).

² See section 30 Act.

error by summarily dismissing the appeal and returned the matter to a different GD Member to determine the merits of the Claimant's appeal. I am that GD Member.

[8] The Claimant says she didn't give informed consent to be vaccinated. She applied for religious and medical exemptions, but her employer refused both requests. She didn't sign away her bodily autonomy or religious beliefs. She says her employer's policy was against her individual Charter rights and freedoms. She has paid into EI her entire working life so she believes she should be entitled to receive benefits.

Matters I have to consider first

Potential added party

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

Issues

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

Analysis

[11] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.³

[12] 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.

³ See sections 30 and 31 of the Act.

Why did the Claimant lose her job?

[13] I find the Claimant lost her job because she didn't comply with the employer's mandatory COVID-19 vaccination policy. Specifically, the employer advised their employees they had to be fully vaccinated by October 15, 2021, unless they had an approved medical or religious exemption.

[14] The Commission says the Claimant's employer put her on leave without pay (suspension) as of October 16, 2021, because she failed to comply with the employer's COVID-19 vaccination policy. When she remained unvaccinated, the employer dismissed her two weeks later, on October 29, 2021. The employer warned the Claimant that she could be dismissed if she failed to comply with the vaccination policy.

[15] The Claimant chose not to be vaccinated. She says the policy shouldn't apply to her because she was working from home and her immediate family members had significant reactions to the vaccine. The Claimant agrees she was dismissed because she failed to comply with the employer's COVID-19 vaccination policy.

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

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

[17] The *Employment Insurance Act* (EI 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 EI 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 the Claimant's conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ The Claimant doesn't have

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.⁶

[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 there was a real possibility of being let go because of that.⁷

[20] The law doesn't say I have to consider how the employer behaved.⁸ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.⁹

[21] I have to focus on the EI law 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.¹⁰ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[22] The Commission has to prove the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Claimant lost her job because of misconduct.¹¹

[23] The Commission says there was misconduct because it determined the Claimant's actions were in breach of her employment contract. She was informed of the employer's policy requiring COVID-19 vaccination and failure to comply with the policy would result in loss of employment. The policy applied to all employees in the Claimant's job role and was the result of a provincial government order. Despite this, the

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See section 30 of the EI Act.

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

Claimant's actions were conscious and intentional, and taken in full knowledge that they would result in the suspension or termination of her employment. In this way, her actions lead to the loss of employment and satisfy the definition of misconduct.

[24] The employer implemented a policy and communicated it to employees. The Claimant was informed about the consequences of non-compliance with the policy. She attended a union grievance meeting where she was clearly told if she remained unvaccinated, she would lose her job. She was aware that regardless of her work location she must still be vaccinated before she would be allowed to return to work. The Claimant's dismissal was the direct result of her non-compliance.

[25] The Claimant says refusing to get vaccinated against COVID-19 was not a wilful, intentional, or deliberate act. She says the employer told her they would look at everyone's circumstances individually, but they didn't. Instead, the employer treated everyone the same. But the employer's policy clearly states it applies to all employees and she confirmed that it applied to her even though she had been working from home.

[26] The Claimant says being unvaccinated didn't affect her ability to perform her duties because she could work from home and didn't work in patient care. She offered to continue working from home or do screening and wear PPEs if working in the building.

[27] The Claimant explained in detail how she requested a medical exemption, a religious exemption, and did the educational training required by the policy. She says she chose not to have the COVID-19 vaccination because her biological daughter had a severe reaction. Then after she lost her job, her mother suffered a stroke (TIA) as a direct result from her booster shot (third vaccination). Her sister also reacted when taking an allergy test. She says she refused to give informed consent to have the vaccination.

[28] I acknowledge the Claimant may have good reasons why she chose not to be vaccinated. But I disagree with her when she says her appeal should be allowed because she believes her circumstances are the same as those in a recent decision

issued by the Social Security Tribunal General Division (*A.L. v C.E.I.C.*).¹² The claimant in that decision worked in health care and was covered by a collective agreement. But the facts pertaining to that case are not the same as the Claimant's circumstances.

[29] As explained during the hearing, I am not bound by decisions issued by other General Division Tribunal Members. I may however be persuaded by other decisions if I find the fact pattern the same. That is not the case here.

[30] In *A.L. v C.E.I.C.*, the Member found the Commission failed to meet the burden of proof to establish that claimant breached an expressed or implied duty arising out of her employment agreement. He made this finding in part, after considering as fact the claimant had a medical condition. In the case before me it is the Claimant's daughter and mother who had reactions to the COVID-19 vaccines. Her sister had a reaction to an allergy test. The Claimant didn't show she had a medical condition. She admits that her doctor and employer refused her request for a medical exemption because she doesn't have a medical condition that meets the requirements for exemption.

[31] The Member in *A.L. v C.E.I.C.* also found that claimant's collective agreement (employment contract) acknowledges she has the right to refuse any recommended or required vaccination. Upon his analysis of that collective agreement, the Member determined there wasn't an expressed duty arising out of that claimant's employment contract. Instead, he found that employer unilaterally imposed the COVID-19 vaccination policy upon that claimant without any consideration of the collective agreement and without consultation with the bargaining agent.

[32] In this case, there are no provisions in the Claimant's collective agreement that speak to vaccination requirements or a right to refuse vaccination. But the Claimant's collective agreement does provide her employer the authority to create policies.¹³ The collective agreement also states as follows:

¹² See *A.L. v Canada Employment Insurance Commission (C.E.I.C.)*, GE-22-1889.

¹³ See page GD2-26.

9.01 The Union acknowledges that it is the exclusive right and function of the Employer to manage and direct its operations and affairs in all respects and, without limiting or restricting this right and function:

(a) to determine and establish standards and procedures for the care, welfare, safety and comfort of the patients/clients of the Employer...¹⁴

[33] Based on the evidence before me, I find the Claimant had an expressed or implied duty to comply with the employer's COVID-19 vaccination policy, arising out of her employment. The employer's policy clearly states employees must declare their vaccination status and must be fully vaccinated unless they receive an approved exemption. The Claimant tried to get medical and religious accommodations, but both were denied. This means she was required to be vaccinated to comply with the policy.

[34] I acknowledge the Claimant has a right to decide whether to be vaccinated or disclose her vaccination status. But she knew there were consequences if she refused to follow the vaccination policy, which in this case was suspension and then dismissal from her employment.

[35] I also acknowledge the employer has a right to manage their day-to-day operations, which includes the authority to develop and impose practices and policies at the workplace, to ensure the health and safety of all their employees and clients.

[36] Whether or not the Claimant worked from home is irrelevant. This is because the duty owed to her employer was to comply with the vaccination policy, which was a condition of continued employment.¹⁵

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

¹⁴ See page GD2-33.

¹⁵ See *MN v Canada Employment Insurance Commission*, AD-22-628.

[38] 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 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.¹⁶

[39] I do not have the authority to determine whether the employer's vaccination policy was unlawful or in breach of the collective agreement. Equally, I do not have the authority to decide whether the employer breached any of the Claimant's rights as an employee when they dismissed 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.

[40] In my view, the Claimant didn't lose her job involuntarily. This is because the Claimant chose not to comply with the employer's policy, which is what led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job. So, I find the Claimant was dismissed from her job because of misconduct.

Conclusion

[41] The appeal is dismissed, with modification to include the period of disentitlement for the suspension from October 18, 2021, to October 29, 2021. The indefinite disqualification for the dismissal is effective October 30, 2021.

Linda Bell

Member, General Division – Employment Insurance Section

¹⁶ 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.