Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant (Claimant):	N. M.
Respondent (Commission):	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision dated March 24, 2022 (issued by Service Canada)

Tribunal member:	Gerry McCarthy
Type of hearing:	Teleconference
Hearing date:	December 14, 2022
Hearing participant:	Appellant
Decision date:	December 30, 2022
File number:	GE-22-3510

Decision

[1]   The appeal is dismissed.

[2]   The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost her job because of misconduct (in other words, because she did something that caused her to be suspended and to lose her job). This means the Claimant was disentitled from receiving Employment Insurance (EI) benefits from October 4, 2021, to October 29, 2021, and disqualified from receiving EI benefits from November 1, 2021.[1]

Overview

[3]   The Claimant worked as a Nurse (Care Co-ordinator) and was placed on an unpaid leave of absence from her job on October 1, 2021. The Claimant then lost her job on November 1, 2021. The Claimant's employer ("X Local Health Integration Network") said the Claimant was suspended and then let go because she failed to comply with their mandatory Covid-19 vaccination policy.

[4]   The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence and then letting her go. It decided the Claimant was suspended and then lost her job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from October 4, 2021, to October 29, 2021, and disqualified from receiving EI benefits from November 1, 2021.

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

Section 31 of the *Employment Insurance Act* says a claimant who is suspended from her employment because of her misconduct is not entitled to receive Employment Insurance (EI) benefits until the claimant meets one of the following provisions: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits.

[5]   The Commission says the Claimant was aware of the employer's vaccination policy and the consequences of failing to comply with the policy.

[6]   The Claimant says the employer's vaccination policy went beyond government guidelines. She further says there was no misconduct on her part.

Issue

[7]   Was the Claimant suspended and dismissed because of misconduct?

Analysis

[8]   To answer the question of whether the Claimant was suspended and lost her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended and lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended and dismissed from her job?

[9]   I find the Claimant was suspended and then lost her job because she failed to comply with the employer's Covid-19 vaccination policy.

[10]   The Commission says the reason the employer gave is the reason the Claimant was suspended and dismissed. The employer told the Commission that the Claimant was placed on an unpaid leave of absence and then dismissed for failing to comply with their Covid-19 vaccination policy.

[11]   The Claimant doesn't dispute that she was placed on an unpaid leave of absence and then dismissed for failing to comply with the employer's vaccination policy. However, the Claimant says the employer's vaccination policy went beyond government guidelines.

[12]   I find the Claimant was suspended and then dismissed for failing to comply with the employer's Covid-19 vaccination policy.

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

[13]   The reason for the Claimant's suspension and dismissal is misconduct under the law.

[14]   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 (in other words, she doesn't have to mean to be doing something wrong) for her behaviour to be misconduct under the law.[4]

[15]   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 and let go because of that.[5]

[16]   The Commission has to prove that the Claimant was suspended and 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 was suspended and lost her job because of misconduct.[6]

[17]   The Commission says there was misconduct because the Claimant was aware of the employer's vaccination policy and the consequences of failing to comply with the policy.

[18]   The Claimant says there was no misconduct because her actions lacked wilfulness.

[19]   I find the Commission has proven there was misconduct, because they showed the Claimant was aware of the employer's vaccination policy and the consequences of

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[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 of Canada 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.

failing to comply with the policy (GD3-25). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees who failed to comply with the policy would be subject to progressive discipline up to and including an unpaid leave and termination of employment (GD3-36). I realize the Claimant argued that her actions lacked wilful behaviour. However, the Commission has proven the Claimant was *aware* of the consequences of failing to comply with the employer's vaccination policy. On this matter, I must apply the legal test for misconduct as established in the case law.

Additional Testimony and Submissions from the Claimant

[20] I recognize the Claimant further testified that the employer's vaccination policy went beyond government guidelines. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. Other avenues existed for the Claimant to make these arguments.[7]

[21] Finally, I realize the Claimant testified she didn't receive clarity from the employer about why she was denied a religious and medical exemption. Nevertheless, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, the only issue before me was whether the Claimant was suspended and dismissed from her job because of misconduct. On this matter, I must apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.[8]

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

[22] Based on my findings above, I find the Claimant was suspended and lost her job because of misconduct.

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[7] *Paradis v Canada (Attorney General)*, 2016 FC 1281.
[8] *Knee v Canada (Attorney General)*, 2011 FCA 301.

Conclusion

[23]   The Commission has proven that the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant was disentitled from receiving EI benefits from October 4, 2021, to October 29, 2021, and disqualified from receiving EI benefits from November 1, 2021.

[24]   This means the appeal is dismissed.

Gerry McCarthy
Member, General Division – Employment Insurance Section