



[TRANSLATION]

Citation: *ER v Canada Employment Insurance Commission*, 2022 SST 1575

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

Decision

Appellant: E. R.
Representative: A. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (480249) dated June 3, 2022 (issued by Service Canada)

Tribunal member: Josée Langlois

Type of hearing: Teleconference
Hearing date: November 29, 2022
Hearing participants: Appellant
Appellant's representative

Decision date: November 30, 2022
File number: GE-22-2188

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant stopped working because of misconduct (in other words, because she did something that caused her to be suspended). This means that she can't receive Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant temporarily stopped working on January 30, 2022. Her employer says that she was suspended because she didn't follow the vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, she says that she didn't intend to get vaccinated. And since she works alone at her workstation, she says that refusing to comply with the employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant stopped working because of misconduct. Because of this, it could not pay her EI benefits.

Issue

[6] Did the Claimant stop working because of misconduct?

Analysis

[7] To answer the question of whether the Claimant lost her job because of misconduct, I have to determine two things: why the Claimant lost her job, and whether the *Employment Insurance Act* (Act) considers that reason to be misconduct.

¹ Section 31 of the *Employment Insurance Act* says that a claimant who is suspended from their job because of misconduct isn't entitled to receive EI benefits until the period of suspension expires.

Why did the Claimant lose her job?

[8] I find that the Claimant lost her job because she refused to provide a COVID-19 attestation in accordance with her employer's policy.

[9] The Claimant and the Commission agree on why the Claimant stopped working. The employer told the Commission that the Claimant was suspended because she hadn't provided the COVID-19 vaccination attestation required to be able to continue working.

[10] The Claimant admits that she refused to comply with the employer's policy that required proof of COVID-19 vaccination. I find that she acted as the employer says she did.

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

[11] The reason for the Claimant's suspension is misconduct under the Act.

[12] To be misconduct under the Act, 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 Act.⁴

[13] 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.⁵

[14] 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

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.

means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.⁶

[15] The Commission says that the Claimant committed misconduct because she wilfully refused to comply with the employer's vaccination policy. It says that even though the Claimant provided the employer with information about her health, she didn't follow the procedure and didn't formally apply for an exemption. Since she was told about the consequences of not complying with the COVID-19 vaccination policy, the Commission is of the view that her refusal to provide the vaccination attestation is misconduct under the Act.

[16] Someone from human resources with the employer explained to a Commission employee that there were a number of individual and group meetings about the COVID-19 vaccination policy. Employees were told about the requirement to provide a COVID-19 vaccination attestation and the consequences of not doing so.

[17] She also said that the Claimant was in constant contact with other employees because she worked on the production line.

[18] On January 13, 2022, the Claimant received a final warning telling her that measures up to and including dismissal would be taken if she didn't comply with the vaccination policy.

[19] On January 30, 2022, the Claimant hadn't provided the employer with a COVID-19 vaccination attestation, and she was suspended.

[20] Although she admits that the employer told her about the policy and the consequences of not complying with it, the Claimant finds that the trainings seemed like harassment, mainly because there weren't discussions on the reasons for not being vaccinated against COVID-19.⁷

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁷ GD3-18.

[21] The Claimant says that she didn't commit misconduct, since refusing to get vaccinated is a personal choice. She says that she worked alone at her workstation (her machine) and wasn't in contact with other employees. She argues that the employer let her test for COVID-19 twice a week for a month before suspending her and that she always followed the health rules. She also says that she had always performed well in her job and had been working for that employer for 14 years.

[22] At the hearing, the Claimant explained that she had previously been diagnosed with skin cancer and that she was worried about getting the COVID-19 vaccine because she didn't know what the side effects were. She thought there was a risk she would develop cancerous cells if she got the COVID-19 vaccine.⁸ But she didn't have a doctor sign a certificate exempting her from getting vaccinated against COVID-19.

[23] The Claimant also argues that a study published in January 2021 shows that there is no difference between vaccinated and unvaccinated people when it comes to transmission of the virus. Because of that, and because the employer had a health policy that she followed, she disagrees with the employer's policy that required her to be vaccinated to continue working.

[24] The Claimant also says that she hasn't gone back to work yet when other employees who didn't follow the policy have. She says that she initiated a proceeding in another forum and that the employer suggested entering into an agreement. For now, she doesn't know whether she will go back to her job. She also mentions a potential human rights proceeding.

[25] I agree with the Commission. Although I understand the Claimant's explanations, when an employee deliberately violates an employer's policy, that behaviour gets in the way of carrying out their duties toward their employer.

⁸ GD3-21.

[26] The employer was willing to adapt its policy for employees who provided exemptions, including for medical reasons, but the Claimant didn't provide such an exemption.

[27] I find that the Claimant could assume that refusing to comply with the employer's policy could get her suspended and even dismissed. In fact, employees were given information saying that there would be consequences up to and including dismissal for those who didn't provide a COVID-19 vaccination attestation.⁹

[28] I do understand the Claimant's reasons for refusing to provide an attestation of her vaccination status. But, as I explained at the hearing, to decide whether refusing to provide a vaccination attestation is misconduct under the Act, I have to determine whether the Claimant's actions amount to misconduct under the Act, not whether the suspension or dismissal was an appropriate measure. Although the Claimant was worried about getting the COVID-19 vaccine because of a previous medical condition, she has to get a vaccine exemption from a doctor. It doesn't have to be the same doctor who previously diagnosed her.

[29] Moreover, the Commission's file shows that the employer provided her with the necessary information and the form to be filled out by a doctor to get a medical exemption.¹⁰ So, despite the medical documents she provided, without a medical certificate saying that she is exempt from getting the vaccine, I can't find that her health requires such an exemption.¹¹ As I explained at the hearing, I have to determine, on the evidence before me, whether refusing to provide a COVID-19 attestation as requested by the employer amounts to misconduct under the Act.

[30] I acknowledge that there must be **a limit to what employers might require of their employees, and a limit to the duty that an employee owes to its employer.**

⁹ GD3-92 *et seq.*

¹⁰ GD3-97.

¹¹ GD3-23 *et seq.*

But, in most cases, **an employer may expect an employee to obey its directions and not be absent from work without excuse.**¹²

[31] So, compliance with the employer's vaccination policy became a condition of employment for all employees. The employer can implement directives or policies to protect the health and safety of employees, and the very purpose of its vaccination policy is to protect employees.

[32] I understand the Claimant's explanations. For personal reasons, she didn't want to get vaccinated and provide the employer with an attestation of her vaccination status, and the employer respected her decision. She asked the employer to accommodate her, but she didn't provide a medical certificate as required by the procedure.

[33] The Claimant knew that the employer had a COVID-19 vaccination policy and that she had to provide proof of vaccination to be able to continue working. She also knew that she could get an exemption for certain reasons, including for health reasons or on human rights grounds. Without such an exemption from getting the vaccine, the Claimant made a conscious decision not to comply with the COVID-19 vaccination policy by refusing to provide a vaccination attestation. Under the employer's policy, she could not continue working.

[34] Even though the employer had temporarily accepted an alternative by letting her take PCR tests twice a week and she would have liked this to continue so that she could keep working, the employer's vaccination policy applied to all employees, and she had to provide a COVID-19 vaccination attestation to continue working.

[35] The Claimant's employer suspended her for not following its rules; she refused to comply with the vaccination policy, which was mandatory for all employees (unless they provided a medical exemption or an exemption for religious reasons). Her refusal to comply with it meant that she wasn't following the employer's rules.

¹² *Canada Employment Insurance Commission v AK*, 2020 SST 155.

[36] The Appellant admits that she received clear guidance from the employer on the vaccination policy. She refused to provide proof of vaccination as required by the policy, and she could not continue working. She knew the rules and decided not to follow them. This deliberate act amounts to misconduct.

[37] I find that the Commission has proven that there was misconduct because the Claimant didn't provide the COVID-19 vaccination attestation required by the employer.

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

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

Conclusion

[39] The Commission has proven that the Claimant stopped working because of misconduct. Because of this, she can't receive benefits.

[40] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section