



Citation: *RL v Canada Employment Insurance Commission*, 2022 SST 1597

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

Decision

Appellant: R. L.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (488314) dated June 27, 2022
(issued by Service Canada)

Tribunal member: Susan Stapleton
Type of hearing: Teleconference
Hearing date: November 14, 2022
Hearing participant: Appellant
Interpreter
Decision date: November 16, 2022
File number: GE-22-2625

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her employment due to her own misconduct. This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended from her job. The Claimant's employer said that she was suspended because she refused to get vaccinated in accordance with the employer's Covid-19 (Covid) vaccination policy.

[4] The Claimant doesn't dispute that this happened. However, she says that her employer's policy violated her rights. She has past health concerns that make her very worried about being vaccinated. She says there was no misconduct.

[5] The Commission accepted the employer's reason for suspending the Claimant. It decided that the Claimant was suspended because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

Matter I have to consider first

[6] At the hearing, the Claimant referred to an internet article stating that vaccine mandates for Alberta Health Services workers were listed. During the hearing, I allowed this document to be filed as evidence and the Claimant sent it in afterwards. She also sent in:

- A May, 2022, Grievance Form;

¹ Section 30 of the *Employment Insurance Act* (Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits. Subsection 30(1) of the Act states that an Appellant who voluntarily leaves employment without just cause is not entitled to benefits under s. 31 of the Act. Section 31 also addresses what happens when an Appellant is suspended for misconduct.

- a Job Description for the position of Dietary Aide;
- a November 14, 2022, email from the Claimant to the employer, asking whether she is allowed to attend a meeting and/or a Christmas party;
- a November 15, 2022, email from the employer to the Claimant, advising that until she is vaccinated, she is not permitted to participate in work activities, and that she remains on unpaid leave; and
- a November 16, 2022 email from the Claimant to the Tribunal.

These documents were reviewed and coded as GD06, GD07 and GD08.

Issue

[7] Was the Claimant suspended from her job because of misconduct?

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

Analysis

Why was the Claimant suspended from her job?

[9] I find that the Claimant was suspended from her job because she didn't comply with her employer's mandatory Covid vaccination policy. The Claimant agrees that she was suspended from her job and put on an unpaid leave because she refused to be vaccinated.

[10] The employer told the Commission Officer² that the Claimant was placed on an unpaid leave (suspended) because she didn't comply with its vaccination policy. The employer emailed its vaccination policy to employees. The policy said that all employees had to be fully vaccinated by October 31, 2021. The employer said that the

² GD3-21.

Claimant didn't inform it of any health concerns with getting the vaccine. The employer said that the Claimant could return to her job as soon as she was vaccinated.

[11] The employer's policy³ was issued on September 16, 2021. It says that all employees must be fully vaccinated by October 31, 2021, and provide proof of vaccination. This meant employees had to receive their second dose of the vaccine before October 16, 2021. If they didn't, they would be considered to be unvaccinated. The policy says that failure to provide proof of vaccination may result in being suspended. Employees could request an exemption from being vaccinated.

[12] In testimony, the Claimant confirmed that she didn't want to be vaccinated. She said that she was very ill as a child and was concerned about the effect the vaccine could have on her health. She had to take a lot of medicine and injections when she was ill as a child, and she doesn't want to take any more.

[13] The employer wrote to the Claimant on October 18, 2021.⁴ It said that she was being suspended from her job effective November 1, 2021, because she wasn't vaccinated.

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

[14] The reason for the Claimant's suspension is misconduct under the law.

[15] The 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.

[16] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes

³ GD3-24-GD3-26.

⁴ GD2-2.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[17] 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 from her job because of that.⁸

[18] The law doesn't say I have to consider how the employer behaved.⁹ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹⁰

[19] 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 suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹¹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[20] The Commission has to prove that the Claimant was suspended 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 because of misconduct.¹²

[21] The Commission says that there was misconduct because the Claimant had been warned that she would be suspended if she wasn't vaccinated. It says the employer has the right to implement a policy for its employees.

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁹ See section 30 of the Act.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Minister of Employment and Immigration v Bartone*, A-369-88.

[22] The Claimant says that there was no misconduct, because she has a medical condition that prevents her from taking the vaccine. She was unable to get her medical records from Thailand to support this. Her doctor in Canada wouldn't support her in seeking an exemption from being vaccinated. She says it is her right as a Canadian citizen not to get the vaccine. Now that the province of Alberta has lifted vaccine mandates, her employer should allow her to go back to work, but they still require her to be vaccinated. Unvaccinated people are allowed to visit the employer's facility, so she doesn't understand why she can't return to work without being vaccinated. She offered to do daily testing instead of being vaccinated, so that she could return to work, but her employer refused to allow that.

[23] I find that the Claimant made a conscious and deliberate choice not to be vaccinated. She testified that she doesn't want to be vaccinated because she is worried about the effects the vaccine will have on her health. She told her employer that she wasn't vaccinated and wasn't going to get vaccinated.

[24] The Claimant knew that not being vaccinated meant that she couldn't do her job. She testified that she knew that if she didn't have the second dose of the vaccine before October 16, 2021, she couldn't return to work.

[25] She said that she spoke to her employer about her concerns. The Dietary Coordinator and the House Coordinator called her in to their office and tried to convince her to get the vaccine. The Claimant said her employer told her there were no circumstances where she could return to work without being vaccinated.

[26] The Claimant testified that she knew that refusing to get vaccinated would result in her being suspended from her job.

[27] The Claimant knew what she had to do under the vaccination policy and what would happen if she didn't follow it. The employer's policy clearly states that failure to provide proof of being vaccinated could result in being suspended. The Claimant confirmed in her testimony that she knew that not getting vaccinated would result in her being suspended from her job.

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

- the employer had a vaccination policy that said all employees had to be fully vaccinated by October 31, 2021;
- the employer clearly communicated its policy to the Claimant, and specified what it expected in terms of getting vaccinated and providing proof of vaccination;
- the employer spoke to the Claimant to communicate what it expected; and
- the Claimant knew the consequence of not following the employer's vaccination policy.

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

[29] Based on my findings above, I find that the Claimant was suspended from her job because of misconduct.

[30] This is because the Claimant's actions led to her suspension. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to be suspended from her job.

Conclusion

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

[32] This means that the appeal is dismissed.

Susan Stapleton
Member, General Division – Employment Insurance Section