



Citation: *DH v Canada Employment Insurance Commission*, 2022 SST 1624

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

Decision

Appellant: D. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (476435) dated June 30, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Teleconference

Hearing date: December 8, 2022

Hearing participant: Appellant

Decision date: December 9, 2022

File number: GE-22-2436

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] 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.

[5] The Claimant says that she didn't get vaccinated, due to her concerns about her medical conditions. She says her doctor provided her with a letter outlining her medical conditions. She says that she was willing to take tests. She says her employer's decision to dismiss her was profit-based.

Issue

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

Analysis

[7] 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

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

² See sections 30 and 31 of the Act.

[8] 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?

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

[10] The Claimant says that her employer's decision to dismiss her was profit-based. She says that unvaccinated students were allowed to continue with their studies at her workplace, as they weren't included in the employer's policy. She says that the employer was able to hire two lower-salaried people to replace her position.

[11] The Commission says that the Claimant didn't follow the employer's workplace vaccination policy. It says the Claimant wilfully disregarded the effect her actions would have on retaining her job, given that she hadn't been advised by her doctor to refuse the vaccination for COVID-19.

[12] The employer told the Commission that the Claimant was dismissed for refusing the vaccine, which was mandated by the employer.³

[13] I find that the Claimant lost her job because she went against her employer's vaccination policy. I rely on the employer's statement that the Claimant was dismissed for not following the policy. I rely on the Claimant's statement that only employees, and not students, were subject to the policy. The Claimant didn't provide sufficient evidence to show that the employer had other motivations in its decision to dismiss her.

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

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

³ See GD3-20.

[15] 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.

[16] Case law says that, to be misconduct, the conduct has to be wilful. This means that the 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 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

[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 let go because of that.⁷

[18] 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 Act.⁹

[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 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 Act.

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

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

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

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

⁸ See section 30 of the 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.

[20] 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.¹¹

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

- The employer adopted and communicated a clear mandatory vaccination policy to all affected employees;
- The Claimant was aware that failure to comply with the policy would cause a loss of employment; and,
- The application of the policy is reasonable within the workplace context.

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

- She provided her employer with a doctor's letter outlining her medical conditions; and,
- She was willing to take COVID-19 tests.

[23] The Claimant testified that she worked with the employer, as a student services coordinator, for 10 years. She says that the employer is an educational institution, and its students include international students.

[24] The Claimant testified that she received an email from her employer in August or September 2021, telling her that she needs to provide proof of the first dose of the COVID-19 vaccine by October 31, 2021.

[25] The Claimant testified that she was given an extension of the deadline to comply with the policy. She says she was told she would be terminated if she didn't provide proof of the first dose of the vaccine by November 30, 2021.

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

[26] The Claimant says that through the month of November 2021, her employer required her to test daily. She brought up this requirement to the human resource department, and the requirement to test was dropped to twice-weekly.

[27] The Claimant says that she asked her employer to allow for her to take tests, instead of the vaccine. She says that the employer denied her request. She says the Ministry of Colleges and Universities allowed for staff to take tests, instead of the vaccine, but not her employer.

[28] The Claimant testified that she didn't get vaccinated.

[29] The Claimant testified that she was scared to get the vaccine, due to her health conditions. She provided her employer with a letter from her doctor, dated September 21, 2021. It outlined her conditions, the specialists involved in her care, and a recent emergency that required prolonged steroid treatment. It stated: "Should her symptoms return, please allow her the appropriate accommodation to seek immediate evaluation and treatment at the ER as she will likely require further steroid treatment at that time".¹²

[30] The Claimant testified that her doctor didn't tell her to not get vaccinated. She says the employer didn't exempt her from the policy for medical reasons.

[31] The Claimant testified that her last day of work was December 7, 2021. She says that instead of being terminated on November 30, 2021, she worked from home the following week so that she could finishing training her replacements.

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

- The employer had a policy requiring vaccination;
- The employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated, and the consequences of not following the policy;

¹² See GD2-2.

- The employer didn't provide the Claimant with a medical exemption of the policy. The doctor's letter the Claimant provided to the employer didn't request accommodation of the policy – but accommodation for her to seek medical treatment when necessary. The Claimant testified that her doctor didn't tell her to not get vaccinated; and,
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy.

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

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

[34] 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.

Conclusion

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

[36] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section