



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 1621

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: S. S.
Representative: S. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (467423) dated May 13, 2022
(issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: November 23, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: November 30, 2022

File number: GE-22-1886

Decision

[1] S. S. is the Claimant. The Canada Employment Insurance Commission (Commission) is refusing to pay Employment Insurance (EI) benefits. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that the reasons she lost her job are misconduct under the meaning of the *Employment Insurance Act* (EI Act) this means that she can't get EI benefits.

Overview

[3] The Claimant's employer introduced a COVID-19 vaccination policy. The employer expected all employees to show proof of vaccination against COVID-19 by October 31, 2021. The Claimant disagreed with the policy and so she wasn't vaccinated by the employer's deadline. The employer suspended the Claimant for 10 days and then dismissed her.

[4] The Commission says that the Claimant stopped working because of misconduct. The Commission says she knew about the employer's policy and she knew she would lose her job if she didn't follow the policy. The Commission says she acted deliberately by refusing to follow the policy.

[5] The Claimant disagrees. She says she has the right to make her own decisions about her health. She says her employer can't force her to take any medical treatment. She says the COVID-19 vaccine isn't safe or effective.

Issue

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

Analysis

[7] The law says you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has suspended or dismissed you.¹

[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] The Commission says the Claimant stopped working because she didn't follow the employer's vaccination policy. The Commission says this caused her suspension and then her dismissal.

[10] The Claimant agrees. She has always said she lost her job because of the employer's vaccination policy.

[11] There isn't any evidence in the appeal file that makes me think the Claimant lost her job for any other reason.

[12] So now I must decide if the Claimant's actions – failing to follow the employer's vaccination policy – amount to misconduct under the meaning of the law.

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

[13] 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

¹ Section 30 of the *Employment Insurance Act* says you are disqualified from receiving benefits if you are dismissed because of misconduct. Section 31 of the *Employment Insurance Act* says you are disentitled from receiving benefits if you are suspended because of misconduct.

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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

[14] 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

[15] 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.⁶

[16] The Commission says the Claimant lost her job because of misconduct. This is because the Commission says she knew about her employer's vaccination policy. She knew the policy said she would lose her job if she wasn't vaccinated against COVID-19 by the employer's deadline. And the Commission says the Claimant acted deliberately when she decided not to follow the employer's policy.

[17] The Claimant disagrees. She says she has the right to make her own decisions about her health. She says her employer can't force her to take any medical treatment. She says she doesn't think the COVID-19 vaccine is safe or effective.

[18] I agree with the Commission. I find that the reason the Claimant lost her job is misconduct under the meaning of the EI Act.

[19] The Claimant and the Commission agree on most of the basic facts in this appeal. But they disagree on how the law applies to the facts.

[20] The Claimant agrees that her employer introduced a vaccination policy. She knew that the employer expected her to be vaccinated against COVID-19 by the

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.

deadline of October 31, 2021. She knew the policy said she would lose her job if she wasn't vaccinated against COVID-19.

[21] Even though the Claimant knew that the policy said she would lose her job, she decided not to get vaccinated against COVID-19. So, at the deadline of October 31, 2021, the Claimant hadn't followed the employer's policy.

[22] The Claimant says that there is a Tribunal decision that is similar to her case.⁷ She says I should rely on this decision and allow her appeal because it involves an employee who chose not to get vaccinated against COVID-19. But in this case, the Tribunal found that the employee hadn't lost his job because of misconduct.

[23] The Commission says that this decision is different from the Claimant's circumstances. The Commission says the decision isn't relevant to this appeal.

[24] I agree with the Commission. I don't find this Tribunal decision relevant or persuasive in this case. This is because the facts are too different.

[25] In the decision the Claimant provided, the employee only learned about his employer's vaccination policy two days before the deadline. There wasn't a written policy and the employer didn't tell the employee that he was at risk of losing his job if he wasn't vaccinated.

[26] But in this appeal, the Claimant agrees that she knew about her employer's vaccination policy. She has never said she didn't have enough time to understand the policy. She has never said her employer didn't give her enough time to follow the policy. She agrees that she knew the policy said she would lose her job if she wasn't vaccinated against COVID-19.

[27] So, I am not persuaded by the Tribunal decision the Claimant submitted.

⁷ *TC v Canada Employment Insurance Commission*, 2022 SST 891.

[28] The Claimant says her employer could have given her alternatives to vaccination. She also says she doesn't think the COVID-19 vaccine is safe or effective.

[29] But it is not up to the Tribunal to decide if the employer acted fairly by introducing a vaccine policy.⁸ It is not up to the Tribunal to decide if the COVID-19 vaccine is safe or effective. I can't make decisions about whether the employer should have granted her an exemption from the vaccination policy. And I can't make decisions about whether the employer violated the terms of the Claimant's collective agreement. The Claimant can pursue other measures through a human rights tribunal or her union if she wants to make these arguments.

[30] My only role is to decide if the Claimant lost her job because of misconduct, under the meaning of the law. And I find that the reason the Claimant lost her job is misconduct. This is because the Claimant and the Commission agree on the following:

- The Claimant understood her employer's vaccination policy. She knew the employer expected her to be vaccinated against COVID-19 by October 31, 2021.
- She knew the policy said she would lose her job if she wasn't vaccinated by the deadline.
- She acted deliberately and made her own decision to refuse vaccination.
- Her actions – refusing to follow the vaccination policy – led directly to her suspension and then her dismissal.

[31] When I consider these points, I have to find that the Claimant lost her job because of misconduct. She acted wilfully by refusing to follow the employer's vaccination policy. She knew her actions were likely to lead to the loss of her job. And she lost her job as a direct result of her actions.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34.

[32] So, I find that the reason the Claimant lost her job is misconduct, under the meaning of the law.

Conclusion

[33] I am dismissing the Claimant's appeal. I find that the Commission has proven that she lost her job because of misconduct. This means that she can't get EI benefits.

Amanda Pezzutto
Member, General Division – Employment Insurance Section