



Citation: *AM v Canada Employment Insurance Commission*, 2022 SST 1638

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

Decision

Appellant: A. M.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (489532) dated August 17, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson
Type of hearing: Teleconference
Hearing date: November 24, 2022
Hearing participant: Appellant
Appellant's witness
Decision date: November 30, 2022
File number: GE-22-3137

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] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

[5] 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.

[6] The Claimant says she didn't act wilfully, but had faith that she would get an exemption based on her medical condition and religion. She says that she didn't realise that she would lose her job if she didn't comply with the policy. She says that her employer didn't respond to her request for an exemption from the policy on time.

[7] The Claimant says the vaccine doesn't stop transmission, and can lead to adverse events. She says she can work from home. She says the policy wasn't reasonable. She says the policy is against a number of laws and legal principles including: the Canadian Bill of Rights, privacy laws, human rights law, the Criminal Code, wrongful dismissal, and her employment contract.

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

Issue

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

Analysis

[9] 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

[10] 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?

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

[12] The Claimant doesn't dispute this happened.

[13] The Commission says the Claimant knew and understood that she would be subject to termination if she failed to comply with the employer's policy. It says that the Claimant acknowledged knowing about the policy, and the consequences of non-compliance. It says that there is additional evidence that clearly outlines the policy and consequences of non-compliance. It says that the Claimant's behavior satisfies the definition of misconduct as it was willful, deliberate, or intentional, and she knew the consequence of not complying with the policy.

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

² See sections 30 and 31 of the Act.

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

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

[16] 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.

[17] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[18] 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.⁶

[19] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁸

[20] 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.⁹ I can

³ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[21] 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.¹⁰

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

- The employer had a vaccination policy;
- The employer clearly notified the Claimant about its expectations about getting vaccinated;
- The employer sent written correspondence to staff and directly to the Claimant to communicate what it expected, and additional documents in the file clearly outline the policy and consequences of non-compliance; and,
- The Claimant's behaviour was willful, deliberate, or intentional and she knew what the consequence would be if she didn't comply with the policy.

[23] The Claimant says that there was no misconduct because she didn't act wilfully, but had faith that she would get an exemption based on her medical condition and religion. She says that she didn't realise that she would lose her job if she didn't comply with the policy. She says that her employer didn't respond to her request for an exemption from the policy on time.

[24] The Claimant says the vaccine doesn't stop transmission, and can lead to adverse events. She says she can work from home. She says the policy wasn't reasonable. She says the policy is against a number of laws and legal principles.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[25] The employer's vaccination policy is an Order of the Provincial Health Officer (PFO), dated October 14, 2021.¹¹ The Order says that employees must be vaccinated or have an exemption to work. It says that unvaccinated employees can't work after October 25, 2021.

[26] On the following dates, the employer told the Claimant about the requirements and the consequences of not following them:

- Employees received an email on October 7, 2021, stating the employer anticipates that all staff will need to be vaccinated against COVID-19. The employer anticipates that if an employee hasn't received a first dose before October 26, 2021, they will be placed on unpaid leave. It stated that there are very limited circumstances for which a medical exemption can be provided, and provided an online link for further information;
- The Claimant received a suspension letter from her employer on October 25, 2021, stating that she hasn't confirmed that she is fully vaccinated. It stated that she is placed on an unpaid leave of absence for three weeks, effective October 26, 2021. It stated that if she doesn't receive a first dose, her employment may be terminated effective November 15, 2021, except if she's currently waiting for a decision on a medical exemption from the PFO;¹²
- The Claimant received a termination letter from her employer on November 15, 2021, stating that she hasn't confirmed that she is fully vaccinated. It stated that she is terminated effective November 15, 2021. It stated that, if her vaccination status changes, she can reapply for a role.¹³

[27] The Claimant testified that:

¹¹ See GD3-53 to 71.

¹² See GD3-81.

¹³ See GD3-83 to 84.

- She heard about the vaccination policy in September 2021 as it applied to clinic workers, but the policy wasn't applicable to her position at that time;
- She left work on October 7, 2021 and went on sick leave, due to her mental state after the death of her friend and a medical condition (cardiovascular symptoms);
- She spoke with a doctor about obtaining a medical exemption on October 7, 2021. The doctor told her that, although she understands the Claimant's concerns, she was unable to provide her with a request for a medical exemption. The doctor told her that she can't give medical exemptions, except for particular allergies;
- She didn't hear that the policy applied to her until a few days before a meeting with management, on October 25, 2021;
- She met with the Director on October 25, 2021 to discuss the policy;
- She sent in her request for a health and religious exemption on October 25, 2021. She didn't include a doctor's note. She didn't include a letter from a religious leader;
- She didn't receive any emails from her employer after October 7, 2021, as she was on sick leave. However, she says that she had access to work email for the week of October 25, 2021;
- She wasn't aware of the medical deferral form until "sometime" in November 2021, and her medical and religious exemption was denied "sometime" in November;
- She didn't realise she would lose her job, as her bosses knew of her medical issues; and,
- She didn't get vaccinated.

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

- The employer had a vaccination policy that said unvaccinated employees can't work after October 25, 2022, unless exempted from the policy;
- The employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated;
- The employer sent written correspondence to the Claimant several times to communicate what it expected, and met with her to speak about the policy. At a minimum, the employer met with the Claimant on October 25, 2021, wrote to the Claimant on October 25, 2021, and the Claimant had access to her work email during the week of October 25, 2021 to further her knowledge of the policy, exemptions, and consequences for non-compliance;
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy. From her testimony, I find that the Claimant knew or should have known that she was unlikely to receive an exemption from the policy, after her conversation with a doctor on October 7, 2021. I find that the Claimant knew or should have known that she would face termination for not following the policy, relying on the letter dated October 25, 2021. I note that the letter confirmed that the employer would have allowed her to return to work if she received a first dose prior to November 15, 2021, the date of her termination.

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

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

[30] 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

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

[32] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section