



Citation: *LC v Canada Employment Insurance Commission*, 2022 SST 1641

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

Decision

Appellant: L. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (466265) dated April 30, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: October 26, 2022

Hearing participant: Appellant

Decision date: October 31, 2022

File number: GE-22-1789

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 job because of misconduct (in other words, because she did something that caused this). This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant worked as a Dietary Aide in a long-term care home for around 36 years. The employer put the Claimant on an administrative leave because she did not comply with the covid19 vaccination policy at work.² The Claimant then applied for EI regular benefits.³

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she was suspended due to her own misconduct.⁴

[5] The Claimant agrees that she did not comply with the covid19 vaccination policy, but explained that she has anxiety and mental health issues.⁵ She has paid into EI benefits for many years, so she should be entitled to receive EI benefits. As well, vaccination was not a condition of her employment.

Matter I have to consider first

The Claimant submitted a document

[6] At the hearing, the Claimant explained that she was worried that she didn't say everything she had planned to say. Because of that, I told the Claimant that she could send the Tribunal an email after the hearing to say anything that she may have missed.

¹ See section 31 of the *Employment Insurance Act* (EI Act).

² See record of employment (ROE) at GD3-23 to GD3-24.

³ See application for EI benefits at GD3-3 to GD3-22.

⁴ See initial decision at GD3-37 to GD3-38 and reconsideration decision at GD3-44 to GD3-45.

⁵ See notice of appeal forms at GD2-1 to GD2-8.

[7] The Claimant sent an email to the Tribunal after the hearing restating her position and included a twitter screenshot from the *Canadian Civil Liberties Association*.⁶ A copy of the Claimant's email and screenshot were sent to the Commission. No reply submissions from the Commission have been received as-of the date of this decision.

Issue

[8] Was the Claimant suspended due to her own misconduct?

Analysis

[9] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.⁷

[10] I have to decide two things. First, I have to determine why the Claimant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant stop working?

[11] I find that the Claimant was put on an unpaid leave of absence effective December 1, 2021. The Claimant's last day of work around November 28, 2021. It was imposed by the employer because she did not have a choice. She was not permitted to return to work or continue working.

[12] This is consistent with the Claimant's testimony, record of employment, discussions between the Claimant and Commission, as well the employer and Commission.⁸

⁶ See GD7-1 to GD7-4.

⁷ See sections 30 and 31 of the Act.

⁸ See record of employment (ROE) at GD3-23 to GD3-24; SROC at GD3-26; SROC at GD3-27; SROC at GD3-28 and letter at GD3-29 to GD3-30.

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

[13] The *Employment Insurance Act* (EI Act) does not 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 EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[14] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁹ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁰

[15] The Claimant does not have to have wrongful intent (in other words, she does not have to mean to be doing something wrong) for her behaviour to be misconduct under the law.¹¹

[16] 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.¹²

[17] The law does not say I have to consider how the employer behaved.¹³ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.¹⁴

[18] I have to focus on the EI Act only. I cannot 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 are not for me to decide.¹⁵ I can

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹¹ See *Attorney General of Canada v Secours*, A-352-94.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See section 30 of the Act.

¹⁴ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁵ 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 EI Act.

[19] The Commission has to prove that the Claimant was suspended from 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 was suspended and/or lost her job because of misconduct.¹⁶

[20] The employer's covid19 vaccination policy (policy) became effective on October 20, 2021.¹⁷ The policy says that the province of Nova Scotia declared a state of emergency due to the covid19 pandemic and that they have an obligation as an employer under *Occupational Health and Safety Legislation* to take all reasonable steps to minimize the risk of infectious disease in the workplace, including exposure to covid19.

[21] A copy of the policy¹⁸ is in the file and the relevant parts state:

- a) All employees will be mandated to be fully vaccinated with a covid19 vaccine series by November 30, 2021¹⁹
- b) Employees who are not fully vaccinated by November 30, 2021, will be placed on an unpaid administrative leave until such time the mandate is no longer current, or they provide proof of vaccination or have provided written resignation
- c) The policy will be administered in accordance with the applicable human rights legislation

[22] The employer told the Commission that it was a mandatory policy and every employee needed to be vaccinated with at least one covid19 vaccine dose by

¹⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁷ See GD3-33 under key points.

¹⁸ See policy at GD3-31 to GD3-36.

¹⁹ See GD3-33.

November 30, 2021.²⁰ If employees did not comply, they would be put on an unpaid leave of absence without pay.

[23] I find that the Commission has proven that there was misconduct for the following reasons.

[24] First, I find that the policy was communicated to the Claimant and that she had enough time to comply. The Claimant testified that she was given around 4 months notice about the policy, possibly around August 2021 or September 2021. She also agreed that she knew about the policy and what she was expected to-do.

[25] Second, I find that the Claimant willfully and consciously chose not to comply with the policy for her own personal reasons. The Claimant agreed that she was aware the policy provided for exemptions.²¹ She has medical concerns, namely anxiety and mental health issues, but she chose not to ask the employer for a medical exemption because she did not believe they would grant it.

[26] I was not persuaded by the Claimant's argument that vaccination was not part of her initial employment contract from around 36 years ago.²² Even so, the court has said that misconduct can include a breach of an express or implied duty in an employment contract.²³ In this case, the employer imposed the policy at work because of the covid19 pandemic, so vaccination for covid19 (unless exempted) became a condition of her continued employment.²⁴

[27] Third, I find that the Claimant knew or ought to have known that not complying with the policy would lead to an unpaid leave of absence. The Claimant agreed that she knew what she had to do under the vaccination policy and what would happen if she did not follow it. This is consistent with a letter sent by the employer to the Claimant on

²⁰ See supplementary record of claim (SROC) at GD3-27.

²¹ See SROC at GD3-28.

²² See job contract at GD6-13 to GD6-15.

²³ See *Canada (Attorney General) v Brissette* 1993 FCA 3020 and *Canada (Attorney General) v Lemire*, 2010 FCA 314.

²⁴ See policy statement at GD3-31.

November 23, 2021. It says she has not complied with the policy, so she will be placed on an unpaid administrative leave effective December 1, 2021.²⁵

[28] The Claimant made deliberate choice to not comply. The Federal Court of Appeal has already said that a deliberate violation of the employer's policy is considered misconduct based on the EI Act.²⁶ Even though the Claimant in this case did not have wrongful intent, it was still misconduct.

[29] The Claimant raised many other arguments, including some of the following:

- a) The employer treated vaccinated and unvaccinated employee differently
- b) The employer was aware that she had anxiety
- c) She has not been recalled back to work and wants to return to work
- d) She is currently permitted to visit the long-term care home and they do not require her to be vaccinated for covid19
- e) She has a right to refuse the covid19 vaccine and does not need to disclose her vaccination status to her employer
- f) Her medical information is private
- g) Her civic rights were violated
- h) There was a gross abuse of bodily autonomy and constitutional rights
- i) She is experiencing financial hardship

[30] I acknowledge the Claimant's additional arguments, but this Tribunal is not the appropriate place to raise her arguments in order to get the remedy she is seeking from her employer (namely, she wants to return to work).

²⁵ See SROC at GD3-29 to GD3-30.

²⁶ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

[31] I am bound by Federal Court decisions. The Federal Court has already decided that it was a matter for another forum when another claimant argued that the employer's policy violated their human rights.²⁷ So this means that I cannot decide whether the employer wrongly put her on an unpaid leave of absence or if she should have been accommodated in another way because these are not for me to decide.

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

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

[33] This is because the Claimant's actions led to her unpaid leave of absence. She acted deliberately. She knew that refusing to get vaccinated was likely to cause this.

[34] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

²⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.