



Citation: *TC v Canada Employment Insurance Commission*, 2022 SST 1656

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

Decision

Appellant: T. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (486386) dated June 24, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference

Hearing date: November 8, 2022

Hearing participant: Appellant

Decision date: November 28, 2022

File number: GE-22-2512

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant is disentitled from receiving employment insurance (EI) benefits.²

Overview

[3] The Claimant's employer adopted a Mandatory Vaccination Policy requiring all its employees to be vaccinated for COVID-19 by December 16, 2021. The Claimant did not get vaccinated by that date and her employer placed her on an unpaid leave of absence.

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

[5] The Claimant does not agree with the Commission. She says that she could not comply with the policy because she is not vaccinated due to her religious beliefs. Her employer only offered an exemption to vaccination based on medical reasons. So she was not able to apply for an exemption based on her religious beliefs.

Matters I have to consider first

The employer is not an added party to the appeal

[6] Sometimes the Tribunal sends a claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

¹ In this decision, the Appellant is called the Claimant and the Respondent is called the Commission.

² Section 31 of the *Employment Insurance Act* (EI Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits until the period of the suspension expires; the claimant loses or voluntarily leaves the employment; or, the claimant works enough hours of insurable employment in another employment to qualify to receive EI benefits.

[7] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

The Claimant was not on a leave of absence

[8] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.³

[9] In the Claimant's case, her employer initiated the leave of absence.

[10] There is no evidence in the appeal file to show the Claimant requested or agreed to taking a period of unpaid leave from her employment.

[11] The section of the EI Act on disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits.⁴

[12] As found below, the evidence shows it was the Claimant's conduct, of refusing to comply with the employer's Mandatory Vaccination Policy that led to her not working. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances can be considered as a suspension.

Issue

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

Analysis

[14] 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.⁵

³ Section 32, EI Act

⁴ Section 31, EI Act

⁵ See sections 30 and 31 of the EI Act.

[15] Specifically, section 31 of the EI Act says that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until

(a) the period of suspension expires;

(b) the claimant loses or voluntarily leaves their employment; or,

(c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

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

Why was the Claimant suspended from her job?

[17] I find that the Claimant was suspended from her job because she did not comply with the employer's vaccination policy.

[18] The Claimant testified that her employer sent out an e-mail about its Mandatory Vaccination Policy to all employees in October 2021. The email had a deadline of December 16, 2021 by which employees were to be vaccinated. The Claimant said, if on December 17, 2021 an employee was not able to provide proof of vaccination they would be sent home from work.

[19] The Claimant testified she did not give any of her medical information to her supervisor. Eventually she did say to her supervisor that she was not vaccinated.

[20] The appeal file has a letter dated December 16, 2021 to the Claimant from her employer. The letter says the Claimant has not provided evidence to her supervisor that she is in compliance with the Mandatory Vaccination Policy, had not obtained an exemption to the policy and was deemed non-compliant with the policy. The letter says that as of end of shift on December 16, 2021 the Claimant was considered Absent

Without Pay until such time as she complied with the policy or the policy was amended or repealed.

[21] This evidence tells me the Claimant was suspended from her job because she failed to get vaccinated, and did not have an exemption to vaccination, as required by the employer's policy.

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

[22] Yes, the reason for the Claimant's suspension is misconduct under the law. The reasons for my finding follow.

[23] The EI Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's suspension is misconduct under the EI Act. Case law sets out the legal test for misconduct. A legal test is the questions and criteria that I consider when deciding whether misconduct has occurred.

[24] Case law says that to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

[25] There is misconduct if the Claimant knew or should have known her conduct could get in the way of carrying out her duties toward her employer and there was a real possibility of being let go because of that.⁹

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

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

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

[26] The courts have said that misconduct includes a breach of an express or implied duty resulting from the contract of employment.¹⁰ A deliberate violation of the employer's policy is considered to be misconduct.¹¹

[27] The law doesn't say I have to consider how the employer behaved.¹² Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.¹³

[28] I have to focus on the EI Act only. I can't make any decisions about whether the Claimant has other options under other laws or her collective agreement. Issues about whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹⁴ I can consider and decide only one thing: is what the Claimant did or failed to do misconduct under the EI Act?

[29] The Commission has to prove the Claimant was suspended from her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show it is more likely than not the Claimant was suspended from her job because of misconduct.¹⁵

[30] The Commission says in this case the Claimant made a personal decision to not adhere to the employer's vaccination policy. It says although the Claimant has strong views as to why she should not get the COVID-19 vaccination, she has not provided anything to actually support that she is unable to get the vaccination. The Commission says because the Claimant made the choice not to get vaccinated, for personal reasons, it can say she initiated the separation from employment, as she knew that not following the policy would result her loss of employment. The Commission says if it looks at the reason for separation as a suspension, it can also determine the Claimant's

¹⁰ See *Canada (Attorney General) v. Brissette*, 1993 CanLII 3030 (FCA) and *Canada (AG) v Lemire*, 2010 FCA 314

¹¹ See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460

¹² See section 30 of the Act.

¹³ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

actions were wilful, reckless and deliberate as it was her choice to not adhere to the employer's policy, therefore, it says, the reason the Claimant lost her employment meets the definition of misconduct as per the EI Act.

[31] As stated above, the Claimant testified her employer sent out an e-mail about its Mandatory Vaccination Policy to all employees in October 2021. The email had a deadline of December 16, 2021 by which employees were to be vaccinated. The Claimant said, if on December 17, 2021 an employee was not able to provide proof of vaccination they would be sent home from work.

[32] The Claimant testified that she did not actually tell her supervisor that she was not getting vaccinated due to her religious beliefs. She did not think that her religious beliefs would be considered based on what the employer's policy said. The Claimant said she would have pursued a religious exemption if it were an option.

[33] The Claimant testified she contacted her union about the policy. Her union agreed with the policy and there was nothing they could do for her. She has not filed a grievance and has not contacted the provincial human rights commission about the policy. The Claimant also said she did not talk to her doctor about not getting vaccinated because she has no medical issues so she did not ask for an exemption to vaccination based on medical reasons.

[34] The Claimant submitted she does not think her actions were misconduct. She noted the Commission submitted that if she was able to provide a religious exemption she should have done so. However, the Claimant said, the employer's policy only provided two options: get vaccinated or provide a medical exemption.

[35] The Claimant testified the policy changed on June 1, 2022 and she has returned to her employment.

[36] I find the Commission has proven there was misconduct, because it has shown the Claimant made the conscious, deliberate and willful decision to not comply with the employer's policy when she was aware that not complying could lead to her being suspended from her job. My reasons for this finding follow.

[37] I am not questioning the authenticity of the Claimant's beliefs. As noted above, it is not my role to determine if the employer's policy was a violation of the provincial human rights code or any other laws.¹⁶ There are other forums where these claims can be heard.

[38] The Claimant's employer introduced a Mandatory Vaccination Policy on October 15, 2021 requiring that all employees be vaccinated for COVID-19 by December 16, 2021. The Claimant said the policy provided for an exemption to vaccination based on medical reasons but did not provide for an exemption based on religious reasons. The Claimant testified she was not able to get vaccinated for religious reasons. She also said that because the policy did not provide for an exemption based on religious beliefs she did not disclose her reasons for not getting vaccinated to her supervisor.

[39] That the Claimant now wishes she pursued a request for exemption based on her religious beliefs and has now returned to work are not determinative of the issue before me. I have to look at the circumstances that existed at the time the Claimant stopped working.

[40] The Claimant testified that all employees were required to be vaccinated by December 16, 2021 or they would be sent home. The Claimant told her employer she was not vaccinated and she remained unvaccinated by the deadline.

[41] This evidence tells me the Claimant was aware of the requirement to be vaccinated by December 16, 2021 and knew that she would be suspended (placed on a leave of absence) if she did not comply with the requirement. The Claimant was not vaccinated by the required date. This means the Claimant made the conscious, deliberate and wilful decision to not comply with the policy when she knew that by doing so she could be suspended from her job and not be able to carry out the duties owed to her employer. As a result, I find that the Commission has proven the Claimant was

¹⁶ The courts have said that in cases for a disqualification from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's act or omission and the conduct of the employer is not a relevant consideration. See *Paradis vs. Canada (Attorney General)*, 2016 FC 1282.

suspended from her job due to her own misconduct within the meaning of the EI Act and the case law described above.

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

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

Conclusion

[43] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits for the period of the suspension.

[44] This means that the appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section