Citation: *LT v Canada Employment Insurance Commission*, 2022 SST 1695

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	L. T.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (467490) dated June 8, 2022 (issued by Service Canada)

Tribunal member:	Solange Losier
Type of hearing:	Teleconference
Hearing date:	December 21, 2022
Hearing participant:	Appellant
Decision date:	December 27, 2022
File number:	GE-22-2329

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 and lost 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] L.T. is the Claimant in this case. She worked as a customer service clerk for the province. The employer first put the Claimant on an unpaid leave of absence, followed by a suspension. She then lost her job for not complying with the employer's policy. The Claimant then applied for EI regular benefits.[2]

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because she was suspended and lost her job due to her own misconduct.[3]

[5] The Claimant disagrees with the Commission's decision.[4] She says that the employer's policy expected unvaccinated employees to do rapid antigen testing three times a week, but vaccinated employees were not required to do it. She says that it was unfair, discriminatory and that vaccinated people can also spread the covid19 virus. As well, she did not feel it was lawful for the employer to ask for her vaccination status, so she did not tell them.

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[1] See section 30 and 31 of the *Employment Insurance Act* (Act).
[2] See application for EI benefits at GD3-3 to GD3-32
[3] See initial decision dated March 14, 2022 at GD3-37; reconsideration decision dated June 8, 2022 at GD3-58 and GD4-3.
[4] See Claimant's notice of appeal at GD2-1 to GD2-12.

Matter I have to consider first

The Claimant submitted documents after the hearing

[6] At the hearing, the Claimant said that the employer had sent her some emails about the policy. As well, she sent the employer an email telling them about her concerns about the policy. She read out the emails and submitted them after the hearing.[5] These documents were shared with the Commission and no reply submissions have been received as of the date of this decision.

Issue

[7] Was the Claimant suspended and did she lose her job because of misconduct?

Analysis

[8] 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.[6]

[9] 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?

[10] I find that the Claimant was put on an unpaid leave of absence effective November 5, 2021 until November 28, 2021 because she did not comply with the employer's policy. This is consistent with the email sent by the Claimant's manager on November 5, 2021.[7] The Claimant was not permitted to continue working and had to leave the workplace.

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[5] See GD10-1 to GD10-9.
[6] See sections 30 and 31 of the Act.
[7] See November 5, 2021 email at GD10-4 to GD10-5.

[11] I find that the Claimant was suspended from her job on November 29, 2021 until February 22, 2022 for the same reasons. The employer referred to it as both an unauthorized unpaid leave of absence and disciplinary suspension.[8]

[12] I acknowledge that the suspension was only supposed to last until December 28, 2021, as the Claimant expected to return to work on December 29, 2021.[9] However, the Claimant did not return on that date because she remained in non-compliance with the employer's policy.[10]

[13] I find that the Claimant then lost her job on February 23, 2021 for the same reason, non-compliance with the employer's policy. A copy of the termination letter is in the file. [11]

[14] The Claimant stopped working because she was not willing to comply with the employer's policy. Specifically, she was not willing to comply with the requirement to do rapid antigen testing three times a week at work, unless everyone at work was required to do it, including those who are vaccinated for covid19.

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

[15] The *Employment Insurance Act* (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 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.[12] Misconduct also includes conduct that is so reckless that it is almost wilful.[13]

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[8] See GD10-6 and
[9] See December 16, 2021 email at GD10-6 to
[10] See December 23, 2022 email at GD3-34 to GD3-36.
[11] See termination letter at GD3-55 to GD3-56.
[12] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[13] See *McKay-Eden v Her Majesty the Queen*, A-402-96.

[17] 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.[14]

[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.[15]

[19] The law does not say I have to consider how the employer behaved.[16] Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.[17]

[20] I have to focus on the 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.[18] I can 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 was suspended and 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 was suspended and lost her job because of misconduct.[19]

[22] The employer implemented a *Covid19 Safe Workplace Directive* (policy) effective on October 1, 2021. A copy of the policy is included in the file.[20]

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[14] See *Attorney General of Canada v Secours*, A-352-94.
[15] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See section 30 of the Act.
[17] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[18] See *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[19] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[20] See policy at GD3-45 to GD3-54.

[23] The purpose of the policy was to help protect the health, safety, and well-being of all employees and Ontarians by promoting higher rates of vaccination against covid19.[21]

[24] I have summarized the relevant parts of the policy (emphasis added is mine):

a) All employees are required to provide **one** of the following:

   i. Proof they are fully vaccinated for covid19

   ii. Written proof of a medical exemption

   iii. Proof that the employee has completed an educational program about covid19 vaccination

b) Employees who choose not to provide their vaccination status, or who are not fully vaccinated **are considered "not vaccinated" under the policy**. Those employees must do rapid antigen testing and provide a negative test result every 48 hours on date determined by the employer.

c) Written proof of a medical exemption is required.

d) Employees who do not comply with the policy **may be placed on an unauthorized, unpaid leave of absence and/or subject to disciplinary action, up to and including dismissal.**

[25] The employer wrote that effective the week of November 1, 2021 employees who were either unvaccinated or deemed unvaccinated (including those who did not attest to their vaccination status) were expected to undertake regular rapid antigen testing and produce a negative result prior to entering the workplace.[22] This applied to all employees, even those who worked remotely.

[21] See GD3-47.
[22] See November 2, 2021 email at GD10-2 to GD10-3.

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

The policy was communicated to the Claimant

[27] First, I find it more likely than not, that the policy was first communicated to the Claimant by October 1, 2021. I have considered that the policy itself says it was approved on September 14, 2021 and made effective by the employer on October 1, 2021.[23] I have also considered that the Claimant and Commission do not appear to dispute that the policy was communicated.

[28] I acknowledge that the Claimant wasn't sure exactly which date the policy was communicated to her. The Claimant did confirm that when she became aware of the policy, she printed off a copy for herself. She agreed that she read it and understood what was expected. She also had enough time to comply with the policy.

The Claimant chose not to comply with the policy

[29] Second, I find that the Claimant wilfully and consciously chose not to comply with the policy for her own reasons. She thought about whether to comply, or not comply. For her own reasons, she decided that unvaccinated (or those deemed unvaccinated) shouldn't have to do rapid antigen testing unless everyone, including the vaccinated had to do it.

[30] In my view, just because an employee disagrees with the employer's policy, it doesn't mean that they don't have to follow the policy, or that no consequences will flow from their decision not to comply with the policy. It is clear that she made a deliberate choice not to comply.

The Claimant was not exempt from the policy

[31] The Claimant did not ask the employer for an exemption from the policy, so she was not exempt from the policy or requirement to do rapid antigen testing. Even so, the

[23] See GD3-47.

Claimant said it would not have made a difference because the people who were exempt from the policy had to do rapid antigen testing anyway.

[32] I accept that the Claimant in this case did not have wrongful intent, it was still misconduct because she deliberately chose not to comply with the employer's policy for personal reasons. The Federal Court of Appeal has already said that a deliberate violation of the employer's policy is considered misconduct based on the Act.[24]

The Claimant knew the consequences of non-compliance

[33] Third, I find that the Claimant knew or ought to have known that by not complying with the policy would lead to unpaid leave of absence, suspension and dismissal. The unpaid leave started on November 5, 2021 and she was only dismissed on February 23, 2022, so she was given enough time to reconsider her decision.

[34] I was not persuaded by the Claimant's testimony that she did not think it would happen so suddenly. The Claimant knew what she had to do under the policy and what would happen if she did not follow it.

[35] The consequences were communicated to her because there were meetings[25], emails[26] and the policy said that employees who do not comply may be placed on an "unauthorized, unpaid leave of absence and/or subject to disciplinary action, up to and including dismissal".[27]

So, was the Claimant suspended and did she lose her job because of misconduct?

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

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[24] See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.
[25] The Claimant said a meeting took place with her employer on November 29, 2021 and January 5, 2022.
[26] See emails at GD10-2 to GD10-9.
[27] See GD3-51.

[37] This is because the Claimant's actions led to her suspension and dismissal. She knew that refusing to follow the testing rules was likely to cause her to be put on an unpaid leave of absence, suspension and lose her job.

What about the Claimant's other arguments?

[38] The Claimant presented other arguments to support her position, including some of the following:[28]

a) The policy was punitive, coercive and discriminatory

b) The employer violated the collective agreement, the Constitution, her human rights and the *Charter of Rights and Freedoms* (Charter)

c) She was constructively dismissed

d) Her medical information is private

e) The policy breached her human rights

f) The covid19 vaccine is experimental, unsafe, and not effective

g) Vaccinated and unvaccinated individual can still transmit covid19

h) She has suffered financial hardship and salary losses

[39] Some of the Claimant's arguments challenge the employer's conduct, including the reasonableness of the policy and the penalties imposed by the employer.

[40] As noted above, I do not have the authority to determine whether the policy was reasonable, or if the Claimant should have been accommodated by the employer, or whether the penalty imposed by the employer should have been different.[29]

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[28] See GD2-5.
[29] See *Canada (Attorney General)* v *Marion*, 2002 FCA 185; C*anada (Attorney General of Canada)* v *McNamara*, 2007 FCA 107.

[41] In another case, the Federal Court decided that it was a matter for another forum when a Claimant argued that the employer's policy violated his human rights.[30] This means that the Claimant's human rights arguments and the alleged discriminatory application of the employer's policy cannot be decided here.

[42] I can only decide whether what the Claimant did or failed to do is misconduct under the *Employment Insurance Act*. I have already decided that the Claimant's conduct does amount to misconduct.

[43] The Claimant's recourse is to pursue an action in court, or any other Tribunal that may deal with her specific arguments to get the remedies she is seeking. The Claimant said that she works in a unionized environment and has already filed three grievances. They are expecting to go to arbitration in June 2023.

Conclusion

[44] The Commission has proven that the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.[31]

[45] This means that the appeal is dismissed.

Solange Losier
Member, General Division – Employment Insurance Section

[30] See *Paradis v Canada (Attorney General)*, 2016 FC 1282.
[31] See section 30 and 31 of the Act.