



Citation: *TD v Canada Employment Insurance Commission*, 2023 SST 75

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

Decision

Appellant: T. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (459998) dated March 15, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Videoconference

Hearing date: January 12, 2023

Hearing participant: Appellant

Decision date: January 22, 2023

File number: GE-22-3265

Decision

[1] I am dismissing the appeal. I disagree with T. D. She is the Appellant (Claimant).

[2] The Canada Employment Insurance Commission (Commission) has shown the Claimant lost her job because of misconduct (in other words, because she did something that caused her to be suspended and then dismissed). This means the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was put on unpaid leave (suspended) and then dismissed from her job. The Claimant's employer says she was let go because she didn't comply with the Provincial Health Order (PHO) mandating COVID-19 vaccination. She refused to get vaccinated.

[4] Even though the Claimant doesn't dispute this happened, she says that going against the public health order vaccination mandate isn't misconduct.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Claimant lost her job because of misconduct. Because of this, the Commission decided the Claimant wasn't entitled to receive EI benefits as of October 31, 2021.

[6] The Claimant disagrees with the Commission's decision to deny her EI benefits. She appealed to the Social Security Tribunal (Tribunal) General Division.

[7] On July 14, 2022, a Member of the Tribunal's General Division (GD) summarily dismissed the Claimant's appeal. The Claimant appealed the GD's decision to the Tribunal's Appeal Division (AD). The AD Member found the GD Member made an error by summarily dismissing the appeal. The AD Member returned the matter to a different GD Member to determine the merits of the Claimant's appeal. I am that GD Member.

¹ See sections 30 and 31 of the *Employment Insurance Act (Act)*.

Matters I have to consider first

Potential added party

[8] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. 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. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Issues

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

Analysis

[10] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.²

[11] 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?

[12] Both parties agree the Claimant lost her job because she refused to be vaccinated against COVID-19 by the deadline set out in the Provincial Health Order (PHO) governing all health care workers.

[13] There is nothing in the file that would make me find otherwise. So, I find the Claimant was suspended and then dismissed from her job because she refused to be vaccinated in accordance with the PHO.

² See sections 30 and 31 of the Act.

Misconduct under EI Law

[14] The Commission has to prove the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Claimant lost her job because of misconduct.³

[15] The *Employment Insurance Act* (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 and dismissal are 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.

[16] Case law says that to be misconduct, the conduct has to be wilful. This means the Claimant's conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[17] 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 there was a real possibility of being let go because of that.⁷

[18] The law doesn't say I have to consider how the employer behaved.⁸ I can't consider whether the PHO or the employer's actions are reasonable. Nor can I consider whether suspension and dismissal were reasonable penalties.⁹ Instead, I have to focus

³ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See section 30 of the EI Act.

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

on what the Claimant did or failed to do, and whether that amounts to misconduct under the EI Act.¹⁰

[19] I can only decide whether there was misconduct under the EI law. I can't make my decision based on 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.¹¹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

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

[20] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[21] The Claimant worked in public health as a registered nurse. She had direct contact with patients, visitors, and other employees. She was a unionized employee. Her employer, a regional public health authority, is governed by the province. The province issued a Public Health Order (PHO) requiring all health-care workers to be vaccinated against COVID-19 on or before October 26, 2021.

[22] The Commission says there was misconduct because the Claimant was aware of the PHO (policy) governing her employment. She was aware of the consequences of non-compliance. Despite this, the Claimant made the wilful and deliberate decision to not comply with the PHO. This wilful act of non-compliance constitutes misconduct as it led to the loss of employment.

[23] The Commission submitted a copy of the Claimant's collective agreement which was valid until March 31, 2022. Section 32.02 speaks to Medical Examinations. It states, "Employees may be required to take skin test, x-ray examination, vaccination.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

Inoculation and other immunization (with the exception of a rubella vaccination when the employee is of the opinion pregnancy is possible), unless the employee's physician has advised in writing that such a procedure may have an adverse effect on the employee's health."¹²

[24] The Commission also pointed to the agreement at section 32.03 titled, Safe Workplace. This section states, "The Employer and employees recognize the need for a safe and healthful workplace and agree to take appropriate measures in order that risks or incidents and/or occupational disease are reduced and/or eliminated. Employers will take all reasonable steps to eliminate, reduce and/or minimize threats to the safety of employees."¹³

[25] The Claimant agrees she was informed about the PHO and the consequences of non-compliance. She received emails where the employer clearly told her the PHO mandating vaccination was a legal requirement for all employees. She attended meetings and received emails where the employer told her if she remained unvaccinated, she could lose her job. The Claimant's dismissal was the direct result of her non-compliance.

[26] The Claimant says it was her employer who was legally bound by the PHO, not her. Her employer dismissed her, but the PHO didn't instruct her employer to dismiss unvaccinated employees. She says she was bound by her collective agreement not the PHO.

[27] The Claimant doesn't dispute that her collective agreement includes the sections 32.02 and 32.03 as set out above. She says those sections don't apply to the COVID-19 vaccination because the collective agreement was signed before COVID-19 existed. These sections don't say employees have to take experimental vaccines. She also says that COVID-19 was moderated under the same protocol as the flu, but the flu vaccine is not mandatory for nursers in her province.

¹² See page GD3-428.

¹³ This can be found at page GD3-428.

[28] The Claimant disclosed her religious convictions and concerns regarding the COVID-19 vaccine. But she wasn't granted a religious exemption. She requested more information, but her questions weren't fully answered. She asked for alternative options, such as rapid testing but her employer refused to consider them. She filed a grievance through her union.

[29] I acknowledge the Claimant has a right to decide whether to be vaccinated or disclose her vaccination status. But she knew there were consequences if she refused to follow the PHO, which in this case was suspension and then dismissal from her employment.

[30] I also acknowledge the provincial health office and employer have a right to manage their day-to-day operations, which includes the authority to develop and impose practices and policies at the workplace, to ensure the health and safety of all employees and patients. The duty owed to her employer was to comply with the PHO, which was a condition of continued employment.¹⁴

[31] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment that is insured against must be involuntary. This is not an automatic right, even if a claimant has paid EI premiums.

[32] The Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.¹⁵

[33] I don't have the authority to determine whether the PHO was unlawful. Equally, I don't have the authority to decide whether the employer breached any of the Claimant's rights as an employee when they dismissed her, or whether they could or should have accommodated her in some other way. The Claimant's recourse against her employer is

¹⁴ See *MN v Canada Employment Insurance Commission*, AD-22-628.

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

to pursue her claims through her union, in Court, or any other tribunal that may deal with those particular matters.

[34] In my view, the Claimant didn't lose her job involuntarily. This is because the Claimant chose not to comply with the PHO, which is what led to her dismissal. She acted deliberately.

[35] I acknowledge that the Claimant says the PHO doesn't tell her employer to dismiss her. The PHO states that unvaccinated employees must not be permitted to work. But she was clearly warned that her employment would be terminated if she didn't comply with the PHO and become fully vaccinated. So I find the Claimant was suspended and then dismissed from her job because of misconduct.

[36] The Claimant was suspended October 25, 2021, and then dismissed on November 19, 2021. Her benefit period didn't start until October 31, 2021. So the Claimant is disentitled during the period of suspension from November 1, 2021, to November 12, 2021.¹⁶ Her employment was terminated on November 19, 2021. This means she is disqualified from receiving EI benefits as of November 14, 2021, the Sunday of the week in which she was dismissed.¹⁷

¹⁶ Section 31 of the EI Act says a claimant who is suspended due to misconduct is disentitled until the week in which the claimant is dismissed from their employment. The disentitlement is imposed on any normal workday (Monday through Friday) that the claimant is not entitled to EI benefits.

¹⁷ Section 30(2) of the EI Act says a disqualification is for each week of the benefit period following the date of dismissal. Section 2(1) of the EI Act defines a week to mean, "a period of seven consecutive days beginning on and including Sunday, or any other prescribed period." This means the effective date of disqualification is the Sunday of the week in which the disqualifying event occurred.

Conclusion

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

[38] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section