



Citation: *DC v Canada Employment Insurance Commission*, 2023 SST 380

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

Decision

Appellant: D. C. (Applicant)

Respondent: Canada Employment Insurance Commission (Commission)

Decision under appeal: Canada Employment Insurance Commission reconsideration decision dated May 27, 2022 (issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: On the Record

Decision date: January 5, 2023

File number: GE-22-4002

Decision

[1] The application to rescind or amend Tribunal decision GE-22-2179 is denied. The new facts are not decisive and would not have affected or changed the original decision.

Overview

[2] The Tribunal originally decided that the Canada Employment Insurance Commission (Commission) had proven the Applicant was suspended and lost her job because of misconduct.¹ Because of that, the Applicant was not entitled to receive Employment Insurance regular benefits.

[3] After a decision has been made, a party can apply to the Tribunal to ask for a decision to be reopened and changed.²

[4] D.C. is the Applicant in this case. She filed an application to rescind or amend Tribunal decision GE-22-2179 on the basis of new facts and information.³ She is asking for the original decision to be changed because of the new information she submitted.

Issue

[5] Whether the decision dated October 21, 2022 for Tribunal file number GE-22-2179 should be rescinded or amended? If so, I must then decide how the original decision changes.

Analysis

[6] The Tribunal can only reopen and change a decision for only the following two reasons:

- a) New facts are presented to the Tribunal or

¹ See GE-22-2170 was issued on October 21, 2022.

² See section 66 of the *Department of Employment and Social Development Act* allows for decisions to be rescinded or amended.

³ See application to rescind or amend at RAGD2-1 to RAGD2-27 and RAGD2A-1.

- b) The decision was made without knowing about, or it was based on a mistake about, some material fact⁴

[7] Both of these reasons involve me looking at whether the new information affects⁵ the issue in the original decision.

[8] For new facts, the court has said that I have to look at whether the new information is “decisive.”⁶ For the second reason I have to look at whether the information is about a “material fact.”⁷

[9] It makes sense that, for both reasons, the Applicant has to show that the new information affects the decision. This is because the Applicant is asking me to change the decision in light of this new information. If the information would not affect—or change—the decision, then there is no point in reopening it.

The application was made within the year

[10] I find that the Applicant filed the application to rescind or amend within the year. The original decision was made on October 21, 2022 and the application to rescind or amend was made on November 28, 2022.⁸

There are new facts

[11] To support her application to rescind or amend, the Applicant sent the Tribunal the following information:

- a) A memo from the employer dated November 8, 2021.
- i. The memo says that the employer was updating their covid19 vaccination policy to say that mandatory vaccination was **no longer**

⁴ Section 66 of the *Department of Employment and Social Development Act*.

⁵ See *Canada (Attorney General) v Chan*, A-185-94, refers to new facts that are “decisive” while section 66 of the *Department of Employment and Social Development Act* refers to some “material fact.”

⁶ *Canada (Attorney General) v Chan*, A-185-94, sets out the legal test for new facts.

⁷ See section 66 of the *Department of Employment and Social Development Act*.

⁸ See application at RAGD2-1 to RAGD2-27 and GE-22-2179 at RAGD02-19 to RAGD2-27.

required for staff, volunteers and contractor, effective December 1, 2022.

- ii. It also says that based on recent arbitration and negotiations with the unions, unionized employees who did not disclose their vaccination status or did not get vaccinated will be offered reinstatement into an unpaid leave.
 - iii. As well, staff who are currently on unpaid leaves will also be eligible to return to the workplace when the updated policy comes into effect on December 1, 2021.
- b) A news article dated November 8, 2022, "*City of Toronto drops COVID vaccine mandate, staff to be offered reinstatement*".⁹
- c) An email thread between the Applicant and her employer between December 2-8, 2022.¹⁰
- i. The Applicant asked her employer for the following: the possibility of the company moving back to a mandatory vaccination policy; for official documentation about reinstatement terms/conditions and if they would accommodate her religious accommodation.

[12] The Applicant submits that the new evidence shows that the employer updated their vaccination policy to reflect that mandatory vaccination is no longer required and unionized employees would be reinstated.¹¹

[13] The Applicant argues that the policy and process were flawed because the employer reversed their decision less than a year after dismissing its employees and then rehired the same employees.

⁹ See news article at RAGD2-11 to RAGD2-18.

¹⁰ See email thread at RAGD3-1 to RAGD3-2.

¹¹ See RAGD2-6.

[14] The Commission acknowledged the Applicant's new information. They responded to it and argued that while the employer has lifted the requirement for employees to be vaccinated (as of December 1, 2022) it does not change the fact that the Applicant was in violation of the employer's policy from November 9, 2021 and it amounts to misconduct.¹²

The new facts are not decisive or material

[15] I find that the additional information provided by Applicant are new facts, however they are not decisive or material because they do not affect or change my previous decision. The fact remains that the Applicant was not compliance with the policy when she was put on an unpaid leave of absence/suspended on November 9, 2021 and dismissed on January 3, 2022.

[16] I agree with the Commission's position on this issue. The covid19 vaccination policy only updated as of December 1, 2022. This was around 11 months after she was already dismissed. The policy update was not retroactive or retracted by the employer. In fact, the memo says that the policy was updated effective December 1, 2022 because "*science and public health guidance no longer supports the need for a mandatory vaccine policy*".¹³

[17] The policy update said that employees were no longer required to be vaccinated for covid19 and unionized employees would be reinstated. The memo confirms that it happened as a result of negotiations and arbitration with the union.

[18] I acknowledge the Claimant's position that the policy and process were flawed. However, I do not have to consider how the employer behaved. The court has said that I have to focus on what the Applicant did or failed to do and whether that amounts to misconduct under the *Employment Insurance Act*.¹⁴

¹² See Commission's representations at RAGD4-1 to RAGD4-2.

¹³ See RAGD2-9.

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

[19] If the Applicant disagrees with the policy and/or process implemented by the employer at the time she was put on an unpaid leave of absence and dismissed, her recourse is to file a grievance (if she is unionized) or alternately to go to court to get the remedy she is seeking from the employer.

[20] The Applicant disputes one of the findings I made in the original decision about vaccination for covid19 being an express or implied term of her employment contract.¹⁵ If she disagrees with the decision I made in GE-22-2179, her recourse is to pursue an appeal with the Appeal Division of this Tribunal.

Conclusion

[21] The application to rescind or amend is denied. The original decision dated October 21, 2022 for Tribunal file GE-22-2179 remains.

Solange Losier

Member, General Division – Employment Insurance Section

¹⁵ See RAGD2-6.