



Citation: *TP v Canada Employment Insurance Commission*, 2023 SST 274

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

Decision

Appellant: T. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (495843) dated July 13, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Teleconference

Hearing date: January 5, 2023

Hearing participant: Appellant

Decision date: January 13, 2023

File number: GE-22-2591

Decision

[1] I am dismissing the appeal. I disagree with T.P., 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 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 Public Health Order (PHO) mandating COVID-19 vaccination. She refused to get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against the PHO 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 December 26, 2021, which is the start date of her claim (benefit period).

[6] The Claimant appeals to the Social Security Tribunal. She says she was wrongfully dismissed because the Provincial Government and her employer failed to provide her with the scientific proof that she required to provide informed consent. She thought the union would act against the COVID-19 policy as they did against the flu vaccine policy back in 2012. She didn't think her employer would go through with dismissing her. She applied for a religious exemption based on Creed, but the Provincial Public Health Officer was only considering medical exemptions.

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

Matters I have to consider first

Potential added party

[7] 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

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

Analysis

[9] 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

[10] 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?

[11] I find the Claimant lost her job because she didn't comply with the Provincial Health Order (PHO). Specifically, on September 24, 2021, the employer advised their employees of the PHO requiring all health-care workers to be fully vaccinated by October 26, 2021. The employer also advised this was anticipated to be a condition of employment. The employer confirmed the requirement to be vaccinated in its October 15, 2021, email as well as in its December 1, 2021, written policy.

[12] The Commission says the Claimant's employer put her on leave without pay (suspension) as of October 25, 2021, because she failed to comply with the PHO. When

² See sections 30 and 31 of the Act.

she remained unvaccinated, the employer dismissed her effective November 18, 2021. The employer warned the Claimant that she would be dismissed if she didn't follow through with getting the COVID-19 vaccination.

[13] The Claimant chose not to be vaccinated. She says she worked as a laboratory technologist at the public hospital. She is a “science minded person,” trained in science. She told her employer she wasn't willing to take the COVID-19 vaccination until she saw the data. She did her own research, but the numbers weren't available because the vaccines were still in the trial phase. The Claimant agrees that her employer dismissed her as of November 18, 2021, because she failed to comply with the PHO.

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

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

[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 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.

[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.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

[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.⁶

[18] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.⁸

[19] I have to focus on the EI law only. I can't 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 aren't for me to decide.⁹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[20] 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.¹⁰

[21] The Commission says there was misconduct because the Claimant was aware of the PHO governing her employment (the policy). She was also 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.

[22] The Claimant worked in public health as a laboratory technologist. Her employer, a regional public health authority, is governed by the province. The Provincial Public

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

⁷ See section 30 of the EI Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

Health Officer issued the PHO requiring all health-care workers to be vaccinated on or before October 26, 2021. Unvaccinated employees are not permitted to work.

[23] The Claimant says she was dismissed before her employer's COVID-19 policy became effective on December 1, 2021. But she was employed by a public health authority governed by the PHO. The PHO clearly states it applies to all health-care workers. She admits she was notified of the PHO on September 24, 2021. She admits she was told she could be fired if she didn't get vaccinated, but she just didn't think the employer would follow through with it. She thought she should be suspended indefinitely, until her union was successful with fighting the PHO and/or the employer's policy through arbitration.

[24] The Claimant was informed about the PHO and the consequences of non-compliance. The employer informed her that all health-care workers will need to be fully vaccinated as a condition of employment. She received emails and attended a meeting where she was clearly told if she remained unvaccinated, she could be dismissed. The Claimant's dismissal was the direct result of her non-compliance.

Why I am not following the Tribunal's decision in *TC v CEIC*

[25] I disagree with the Claimant when she says her appeal should be allowed based on a recent decision issued by the Social Security Tribunal General Division, *TC v CEIC*.¹¹ I have set out my reasons below.

[26] The Claimant argued that her circumstances are like those in *TC v CEIC*. Specifically, she says she was told she would be terminated but she didn't think the employer would "actually follow through with it." She argued the PHO didn't say the employer had to dismiss her, it only said she would be prevented from working. She also argued that she was terminated before the employer's written policy was approved on December 1, 2021.

¹¹ The Claimant submitted a copy of the Tribunal's decision, *D.L. v Canada Employment Insurance Commission (C.E.I.C.)*, GE-22-510, at pages GD6-2 to GD6-10.

[27] In *TC v CEIC*, TC worked as a delivery driver for a diaper company. Based on the evidence and arguments of that case, the Tribunal Member determined TC was dismissed two days after he was told about the employer's COVID-19 vaccination policy. The Tribunal Member found that TC didn't lose his job due to misconduct for the following reasons:

- First, the policy was only verbally communicated to TC on July 7, 2021, and he was expected to comply by July 9, 2021.
- Second, TC didn't know and couldn't have known the consequences of non-compliance would lead to his dismissal. The employer told him that if he did not want to comply, he could quit his job. As well, the documents given to him by the employer don't say that he would be dismissed from his employment.
- Third, TC wasn't provided with a written policy or order. He didn't know the specific contents of the policy, the consequences of not complying or whether he could request an exemption from the policy. He wasn't given a chance to understand the policy, to know what is required, to have an opportunity to review and/or ask questions or given enough time to comply.
- Lastly, TC didn't consciously, deliberately, or intentionally breach the employer's verbal direction. His conduct was not reckless. He simply wasn't provided with enough time to comply and could not have known he would be dismissed for his conduct.

[28] I am not bound by other decisions made by this Tribunal.¹² This means I don't have to follow those decisions. I can rely on them to guide me if I find them persuasive or helpful.

¹² I have to follow the Federal Courts decisions that are on point with the case I am deciding. This is because the Federal Courts have greater authority to interpret the EI Act. I don't have to follow other Social Security Tribunal decisions because other Members of the Tribunal have the same authority that I have. This rule is called *stare decisis*.

[29] I am not persuaded by the Tribunal's decision in *TC v CEIC*. This is because the facts are not similar to those before me.

[30] In this case, the Claimant worked in public health for an employer governed by the PHO. The PHO and the employer's directions were communicated to the Claimant, in writing, on September 24, 2021. This was several weeks before her suspension and subsequent dismissal. The consequences of non-compliance were clearly communicated to the Claimant both verbally and in writing. The Claimant made a conscious and deliberate choice not to comply with the PHO.

[31] 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.

[32] 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 Claimant's duty owed to her employer was to comply with the PHO, which was a condition of continued employment.¹³

[33] 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.

[34] 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.¹⁴

¹³ See *MN v Canada Employment Insurance Commission*, AD-22-628.

¹⁴ 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.

[35] I do not have the authority to determine whether the PHO was unlawful. Equally, I do not have the authority to decide whether the provincial health office or 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 to pursue her claims through her union, in Court, or any other tribunal that may deal with those particular matters.

[36] 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. Although she says she really didn't think her employer would follow through with dismissing her, she was clearly warned that refusing to get vaccinated would cause her to lose her job. So, I find the Claimant was dismissed from her job because of misconduct.

[37] The claim (benefit period) started on December 26, 2021, several weeks after the Claimant was dismissed. This means the Claimant is disqualified from receiving EI benefits as of December 26, 2021.

Conclusion

[38] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section