



Citation: *XH v Canada Employment Insurance Commission*, 2022 SST 1707

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

Decision

Appellant: X. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (510976) dated August 12, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Videoconference

Hearing date: December 16, 2022

Hearing participant: Appellant

Decision date: December 26, 2022

File number: GE-22-2932

Decision

[1] I am dismissing the appeal. I disagree with 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 dismissed from her job. The Claimant's employer says she was let go because she went against its COVID-19 vaccination policy. She refused to get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy 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 is disqualified from receiving EI benefits.

[6] The Claimant says the employer's policy was only an internal policy without any legal basis. She says the Commission must honour the Canadian Bill of Rights and the Constitution as well as other applicable legislation and laws. She argues she was wrongfully dismissed because applying the vaccination policy to her was not reasonable within her workplace context because she was working from home.

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

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

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 employer's mandatory COVID-19 vaccination policy. Specifically, the employer advised their employees they had to be fully vaccinated by November 1, 2021.

[12] The Commission says the Claimant's employer dismissed her effective January 31, 2022, because she failed to comply with the employer's COVID-19 vaccination policy. The employer issued her several warnings that she could be dismissed if she failed to report she had received the first dose of the COVID-19 vaccination.

[13] The Claimant chose not to be vaccinated. She says the policy wasn't reasonable for her because she was working from home right up until she was dismissed on January 31, 2022. She says other employees continued to work from home after she

² See sections 30 and 31 of the Act.

was dismissed. The Claimant agrees she was dismissed because she failed to comply with the employer's COVID-19 vaccination policy.

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

[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

³ See *Mishibinjima 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.

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.

[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 employer's policy, and aware of the consequences of non-compliance. Despite this, the Claimant made the wilful and deliberate decision not to comply with the employer's policy. This wilful act of non-compliance constitutes misconduct as it led to the loss of employment.

[22] The employer implemented a policy and communicated it to employees. The Claimant was informed about the consequences of non-compliance with the policy. She was issued warnings that her failure to comply with the policy could lead to her dismissal. The Claimant's dismissal was the direct result of her non-compliance.

[23] The Claimant says refusing to get vaccinated against COVID-19 was not a wilful, intentional, or deliberate act that interfered with her ability to perform her duties. She says she was able to continue her duties while working from home. But the employer's policy clearly states it applies to all employees and working from home is not an alternative to not being vaccinated.

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

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

[24] The Claimant argues that medical procedures are not akin to performing aspects of one's duties or responsibilities of their job. So, she believes there is no legal justification to deny her benefits. She says the case law referred to by the Commission doesn't reflect her situation. She never missed work and she doesn't have an addiction to alcohol.¹¹

[25] Although the Claimant may not have an addiction or didn't miss work, I find she made a deliberate choice not to comply with the employer's policy. This conduct was a breach of the employer's policy and she knew it would result in discipline, up to and including the employer dismissing her.

[26] The policy clearly states employees must declare their vaccination status and must be fully vaccinated unless they receive an approved exemption from the employer. The Claimant tried to get a medical accommodation, but it was refused. This means she was required to be vaccinated and report her vaccination status in order to comply with the policy.

[27] 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 vaccination policy, which in this case was dismissal from her employment. I also acknowledge the employer has 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 their employees and clients.

[28] Whether or not the Claimant worked from home is irrelevant. This is because the duty owed to her employer was to comply with the vaccination policy, which was a condition of continued employment.¹²

[29] 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

¹¹ The Claimant referred to *Mishibinijima v. Canada (AG)*, 2007 FCA 36.

¹² See *MN v Canada Employment Insurance Commission*, AD-22-628.

insured against must be involuntary. This is not an automatic right, even if a claimant has paid EI premiums.

[30] 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.¹³

[31] I do not have the authority to determine whether the employer's vaccination policy was unlawful. Equally, I do not 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 to pursue her claims through a union, in Court, or any other tribunal that may deal with those particular matters.

[32] In my view, the Claimant didn't lose her job involuntarily. This is because the Claimant chose not to comply with the employer's policy, which is what led to her dismissal. She acted deliberately. She knew that refusing to disclose her vaccination status or to get vaccinated was likely to cause her to lose her job. So I find the Claimant was dismissed from her job because of misconduct.

Conclusion

[33] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

¹³ 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.