



Citation: *DJ v Canada Employment Insurance Commission*, 2022 SST 1711

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

Decision

Appellant: D. J.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (489047) dated July 19, 2022
(issued by Service Canada)

Tribunal member: Marc-André St-Jules
Type of hearing: Teleconference
Hearing date: December 20, 2022
Hearing participant: Appellant
Decision date: December 29, 2022
File number: GE-22-2722

Decision

[1] The appeal is dismissed with modification. The Tribunal disagrees with the Claimant who is the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended from her job. The Claimant's employer told the Commission that the Claimant was suspended without pay because she went against its vaccination policy: she refused to be vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that there was no misconduct. She complied with the policy from September 2021 until it was changed in January 2022. The Claimant says she researched the vaccines and made the decision not to take it herself. As a result, she was placed on unpaid leave with the employer.

[5] The Commission accepted the employer's reason for the leave. The Claimant knew, or ought to have known, that the consequences of refusing to comply included unpaid leave. The Commission decided that the Claimant took leave from her job without just cause. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

Issue

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

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Analysis

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

[8] 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?

[9] I find that the Claimant lost her job because she did not comply with her employer's vaccination policy.

[10] The Commission's original and reconsideration decision letters were reviewed.³ The Commission stated in both letters that the Claimant was disentitled for voluntary taking leave from her job without just cause.⁴ In her appeal to the Tribunal, the Claimant stated she does not agree with voluntary leave and argues she was placed on an unpaid leave.

[11] The Commission did raise this issue in their submissions to the Tribunal.⁵ They agree the notices should have been issued stating suspended due to misconduct. The Commission then provides arguments supporting suspension for misconduct.

[12] Based on the evidence before me, I find the Claimant was suspended for refusing to abide by the vaccine policy.

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

[13] The reason for the Claimant's suspension is misconduct under the law.

² See sections 30 and 31 of the Act.

³ See GD3 pages 16 and 41.

⁴ See section 32 of the Act.

⁵ See GD2 page 4.

[14] The *Employment Insurance Act* (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 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.

[15] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

[16] 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.⁹

[17] The law doesn't say I have to consider how the employer behaved.¹⁰ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹¹

[18] I have to focus on the EI Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹² I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

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

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See section 30 of the Act.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[19] The Commission has to prove that the Claimant 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 lost her job because of misconduct.¹³

[20] The Commission says that there was misconduct because:

- The employer had a vaccination policy which states unpaid leave for individuals who do not comply.
- The employer communicated the policy to all staff.
- The communication clearly notified the Claimant about its expectations regarding vaccination.
- The Claimant knew or should have known what would happen if she didn't follow the policy.

[21] The Claimant says that there was no misconduct because:

- She had an exemplary career with her employer with no disciplinary issues or complaints from any clients ever lodged against her.
- The vaccine efficacy is doubtful and the long-term effects are not known.
- The government is twisting the meaning of misconduct to deny employment insurance benefits. Had there been any misconduct, she would also be referred to the governing body for nurses in Ontario.
- There were no laws, federal or provincial, requiring her employer to implement a vaccine policy with suspension or termination. Her employer is a private employer. There was no obligation to have suspension as part of their policies.

¹³ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- She complied fully with the vaccine policy from September 7, 2021, until her suspension effective February 1, 2022. She took tests twice-weekly and submitted the results to management as required.¹⁴

[22] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said employees must be in compliance or may be suspended.
- The employer clearly advised the Claimant about what it expected of its employees in terms of vaccination.
- The employer communicated the policy to all staff to explain what it expected.
- The Claimant knew or should have known about the consequence of not following the employer's vaccination policy.

[23] For reasons set out below, I find the Claimant knew or ought to have known the consequences for non-compliance with the employer's vaccination policy. The Claimant acknowledged receipt of the policy and testified she had read it.

[24] The Claimant testified her employer introduced a vaccination policy which became effective September 7, 2021. Her employer provided a copy to all employees.¹⁵ Her employer implemented the policy following Directive 6 imposed by the province of Ontario.¹⁶ The Claimant testified she did read the policy at the time. She also agreed that this policy included a clause for non-compliance which included suspension without pay.

[25] The Claimant testified that from September 7, 2021, to January 31, 2022, her employer did not suspend her but accepted alternatives to vaccination. Her employer decided full personal protective equipment (PPE) and twice-weekly tests for COVID was

¹⁴ The Claimant testified she tested more often if there were concerns or symptoms.

¹⁵ See GD3 pages 34-37.

¹⁶ See GD2 pages 13-15. Directive 6 was issued by the Province of Ontario and sets out the minimum policy requirements regarding health care worker vaccination.

acceptable. This went over and above the provincial requirements, as Directive 6 only required testing once a week. The Claimant testified this worked well for the Claimant and the employer. She added that no known COVID cases resulted because of this.

[26] The Claimant testified that part of her job involved working in homeless shelters as a nurse. She worked with patients with severe drug, alcohol and mental health issues. For this reason, the patients would rarely, if ever, wear masks, wash hands or social distance. In this environment, the Claimant testified the precautions taken to avoid transmission worked. For this reason, the additional measure of requiring vaccination was not justified.

[27] The Claimant testified that employees were notified on January 10, 2022, of a change in the policy.¹⁷ As part of this change, employees were told that effective February 1, 2022, all employees who had not received their first vaccine would be placed on unpaid leave.

[28] Another change with this updated policy was that non-compliance now involves the possibility of termination.¹⁸ The previous policy had suspension without pay and no mention of termination. The Claimant testified that she was aware of this change as well. However, as of the hearing date, she has not been terminated and remains on suspension.¹⁹

[29] During the hearing, the Claimant stated that although she agreed she received the policy and was aware of its contents, she does not agree with the vaccine requirement at all. She argues this new change was not required.

[30] The Claimant testified she has serious concerns regarding the use of the word misconduct. The employer is not alleging this at all. The Claimant supplied a letter from

¹⁷ See GD3 page 38. The communication to staff was made January 10, 2022. The policy, however, was dated January 7, 2022.

¹⁸ See GD3 page 23.

¹⁹ See GD2 page 17. This is a letter from the employer dated May 9, 2022, which confirms the Claimant was still on unpaid leave. The Claimant testified she received a very similar one in October 2022.

her employer dated August 21, 2021, in support of the fact that she was in good standing.²⁰

[31] The claimant argues that if there was any misconduct involved, she would have been referred to the governing body for nurses in Ontario. The Claimant testified this is not the case and there was never any misconduct on her part. As part of this argument, the Claimant says that the Commission is twisting the definition of misconduct. Her employer never accused her of misconduct in any way.

[32] The Claimant says that the threshold for misconduct has not been met. I accept the Claimant never had any wrongful intent. Nothing in the file suggests this and I am confident this is the case. However, the courts have ruled over the years that a person does not have to have wrongful intent for there to be misconduct.²¹ It is sufficient that the conduct be conscious, deliberate, or intentional.

[33] I agree the Claimant can decline vaccination. That is her own personal decision. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace.

[34] Some employers implement policies to comply with legislation. However, that is not always the case. An employer can do so without a legislative requirement. Employers can and do implement policies to protect their employees, reputation and to minimize potential liabilities from lawsuits. For this reason, the employer going over and above the requirements of Directive 6 is not an issue I need to consider.

[35] The Federal Court of Appeal has said that the Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal or

²⁰ See GD2 page 16

²¹ See *Caul v Canada (Attorney General)*, 2006 FCA 251, *Pearson v Canada (Attorney General)* 2006 FCA 199.

suspension was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the Act.²²

[36] I find the Claimant to be very credible. Her statements were consistent and nothing from the Commission suggests any credibility issue. I have no doubt the Claimant was a valuable employee. She stated she had an excellent work history with no disciplinary record. Nothing in the file contradicts this.

[37] I understand that the Claimant feels that because she paid into the employment insurance fund, she should receive benefits. This belief goes against the fundamental principle of employment insurance, that is, an employee must not voluntarily place herself in a position of unemployment.

[38] I understand the Claimant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't rewrite the law or add new things to the law to make an outcome that seems fairer for the Claimant.²³

[39] The evidence before me shows the Claimant made a personal and deliberate choice not to follow the employer's policy.

So, did the Claimant lose her job because of misconduct?

[40] Based on my findings above, I find that the Claimant lost her job because of misconduct. The Claimant's actions led to her suspension without pay. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

²² See *Canada (Attorney General) v Marion*, 2002 FCA 185.

²³ See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.

Conclusion

[41] The Commission has proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[42] This means the appeal is dismissed with modification. I find the Claimant was suspended due to misconduct. She did not voluntarily take a leave from her job.

Marc-André St-Jules
Member, General Division – Employment Insurance Section