



Citation: *DP v Canada Employment Insurance Commission*, 2023 SST 455

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

Decision

Appellant: D. P.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (481504) dated August 23, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: January 18, 2023

Hearing participant: Appellant

Decision date: January 25, 2023

File number: GE-22-3261

Decision

[1] D. P. is the Claimant. The Canada Employment Insurance Commission (Commission) says she can't get Employment Insurance (EI) benefits. This is because the Commission says she lost her job because of misconduct. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that she lost her job because of misconduct. This means that she can't get EI benefits.

Overview

[3] The Claimant worked in health care. Following an order from the provincial government, her employer brought in a COVID-19 vaccination policy. Under the policy, the employer expected all employees to either show proof of vaccination against COVID-19 or have an approved exemption from vaccination. The policy said that the employer would eventually fire anyone who didn't follow the policy.

[4] The Claimant chose not to follow her employer's policy. She told her employer that she wasn't vaccinated against COVID-19 and she didn't ask the employer for an exemption from vaccination. So, the employer fired her on December 2, 2021. The Claimant applied for EI benefits but the Commission refused to pay benefits.

[5] The Commission says it can't pay EI benefits. The Commission says the Claimant lost her job because of misconduct. The Commission says she knew about her employer's COVID-19 vaccination policy. She knew that she could lose her job if she didn't follow the policy. But the Commission says she acted deliberately when she didn't follow the employer's policy.

[6] The Claimant disagrees. She says that the employer should have given her alternatives to vaccination. She says the provincial health order doesn't say that her employer had to fire her if she didn't follow the policy. And she says that it is her right to refuse any medical treatment or medication.

Issue

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

Analysis

[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] The Commission says the Claimant's employer fired her on December 2, 2021 because she didn't follow their vaccination policy. The Commission says the Claimant wasn't vaccinated by the employer's deadline, and the employer hadn't given her an exemption from vaccination.

[10] The Claimant agrees. At the hearing, she said her employer fired her because of the COVID-19 vaccination policy. She said she told her employer that she wasn't vaccinated and the employer hadn't given her an exemption from the policy.

[11] There is also a termination letter from the Claimant's employer in the appeal file. The letter says the employer is firing the Claimant on December 2, 2021 because she hasn't followed their COVID-19 vaccination policy.

[12] So, the Claimant and the Commission agree that the Claimant's employer fired her because she didn't follow the COVID-19 vaccination policy. The evidence in the appeal file also shows me that this is the reason the Claimant lost her job. Nothing in the appeal file makes me think the Claimant lost her job because of any other actions.

[13] Now I must decide if the Claimant's actions – failing to follow her employer's COVID-19 vaccination policy – is misconduct under the meaning of the law.

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

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹ Misconduct also includes conduct that is so reckless that it is almost wilful.² 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.³

[15] 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.⁴

[16] 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.⁵

[17] The Commission says the reason the Claimant lost her job is misconduct. The Commission says the Claimant knew about her employer's COVID-19 vaccination policy. She knew she would lose her job if she didn't follow the policy. And she acted deliberately when she decided not to follow the policy.

[18] The Claimant disagrees. She says her employer should have given her alternatives to vaccination, like regular testing. She says the employer's policy goes beyond the provincial health order, because the provincial health order doesn't say the employer had to fire her. And she says she has the right to make her own decisions about medical treatment.

[19] I agree with the Commission. I find that the reason the Claimant lost her job is misconduct under the meaning of the law.

¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³ See *Attorney General of Canada v Secours*, A-352-94.

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

⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[20] The Claimant and the Commission agree about many of the basic facts in this appeal, but they disagree about how the law applies to these facts.

[21] The Claimant has always said that her employer brought in a COVID-19 vaccination policy. She said she first learned about the policy in August 2021. Under the policy, the Claimant knew that her employer expected all employees either to be vaccinated against COVID-19 or have an approved exemption from vaccination.

[22] At the hearing, the Claimant agreed that the policy said the employer would fire her if she didn't follow it. She said the original deadline to follow the policy was in October 2021, but then the employer extended the deadline to November 2021.

[23] The Claimant agrees that she didn't follow the employer's COVID-19 vaccination policy. She told her employer that she wasn't vaccinated against COVID-19. She didn't ask the employer for an exemption from the policy. Her employer didn't tell her that she was exempt from following the policy.

[24] The employer's COVID-19 policy is in the appeal file. It says that all employees must be vaccinated against COVID-19 or have an approved exemption from vaccination. The policy says that the employer will discipline employees who don't follow the policy. Discipline can include termination.

[25] There are also letters from the employer to the Claimant in the appeal file. The employer sent the Claimant letters in September, October, and November 2021. In each letter, the employer reminds the Claimant of the COVID-19 vaccination policy. The letters say the employer will fire the Claimant if she doesn't follow the vaccination policy.

[26] The Claimant argues that there is a recent decision from the General Division (GD) of the Tribunal that describes a very similar situation to hers.⁶ In this decision, the GD Member found that the worker's employer unilaterally added a new requirement to her employment contract by bringing in a COVID-19 vaccination policy. The GD Member found that neither the worker nor her union had agreed to this new employment

⁶ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

condition. The GD Member noted that the worker's collective agreement didn't include any requirement to be vaccinated against COVID-19. The GD Member found that the Commission hadn't proven that the worker lost her job because of misconduct because it hadn't proven that the worker committed an express or implied breach of her employment contract.

[27] The Claimant says I should follow this GD decision. She says the elements of this case are very similar to her situation.

[28] I disagree with the Claimant. I am not going to follow the conclusions of this GD decision.

[29] The Tribunal tries to make decisions that are consistent. This means that Tribunal Members should try to follow each others' decisions. But some decisions are outliers. They might interpret the law in a different way. They might use the same case law to reach a novel conclusion. This is one of the reasons why Tribunal decisions aren't binding on other Tribunal Members. But Federal Court and Federal Court of Appeal decisions form part of the law and I have to follow these decisions.

[30] And Federal Court of Appeal and Federal Court decisions consistently say that I can't look at the employer's actions when I am making a decision about misconduct. I can't look at whether the employer should have given the Claimant alternatives to vaccination. I can't make a decision about whether the employer's policy was fair or justified. I can't look at whether the employer's decision to fire the Claimant was too harsh. I can only look at the Claimant's own actions and decide if the reasons she lost her job meet the test for misconduct.⁷

[31] And even though other Tribunal decisions aren't part of the law, I must note that there are many GD and Appeal Division (AD) decisions that have looked at similar situations and decided that refusing to get vaccinated against COVID-19 can be

⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 at paragraphs 30 and 31 and *Canada (Attorney General) v McNamara*, 2007 FCA 107, paragraphs 22 and 23.

misconduct. In particular, many AD decisions agree that there is misconduct when the following conditions are in place:⁸

- The employer has a clear policy about COVID-19 vaccination
- The employer notifies its employees of the policy and gives them enough time to follow the policy
- The policy is clear about the consequences of refusing to follow the policy
- As a result, the employee knows, or reasonably ought to know, that they will probably lose their job if they don't follow the COVID-19 vaccination policy
- Even so, the employee makes a deliberate choice not to follow their employer's COVID-19 vaccination policy

[32] I find that all of these conditions are in place in this appeal.

[33] The Claimant agrees that she knew about her employer's COVID-19 policy. She agrees that the employer gave her many weeks' notice of the policy. And there are at least three letters in the appeal file from the employer to the Claimant, notifying her of the policy, the deadline for vaccination, and the consequences of refusing to follow the policy. The Claimant agrees that the policy said the employer would fire her if she didn't follow the policy. So, I find that the Claimant knew that she was likely to lose her job. And finally, the Claimant made a deliberate choice not to follow her employer's COVID-19 vaccination policy. Her actions were deliberate.

[34] So, I find that the Claimant lost her job because of misconduct. My decision is consistent with Federal Court and Federal Court of Appeal case law. My decision is also consistent with many other GD and AD decisions.

⁸ See, for instance, two recent AD decisions: *SS v Canada Employment Insurance Commission*, 2022 SST 1004 and *MF v Canada Employment Insurance Commission*, 2022 SST 1099.

Conclusion

[35] I find that the Claimant lost her job because of misconduct. This means that she can't get EI benefits.

Amanda Pezzutto
Member, General Division – Employment Insurance Section