



Citation: *DS v Canada Employment Insurance Commission*, 2022 SST 1731

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant (Claimant): D. S.

Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (485279) dated July 6, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: In person

Hearing date: December 7, 2022

Hearing participant: Appellant

Decision date: December 27, 2022

File number: GE-22-2770

Decision

[1] The Claimant's appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits from January 9, 2022.¹

Overview

[3] The Claimant worked as a courier driver and was placed on an unpaid leave of absence on January 7, 2022 (last day paid). The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence for failing to comply with their vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. It decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided that the Claimant was disentitled from receiving EI benefits from January 9, 2022.

[5] The Commission says the Claimant was aware of the employer's vaccination policy and that she would be suspended if she refused to follow the policy.

[6] The Claimant says the employer changed their vaccination policy numerous times and she thought they were bluffing about being placed on an unpaid leave of absence.

¹ Section 31 of the *Employment Insurance Act* (EI Act) says a claimant who is suspended from her employment because of her misconduct is not entitled to receive employment insurance benefits until the claimant she meets one of the following provisions: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits.

Issue

[7] Was the Claimant suspended from her job because of misconduct?

Analysis

[8] To answer the question of whether the Claimant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from her job?

[9] I find the Claimant was suspended from her job because she failed to comply with the employer's vaccination policy.

[10] The Commission says the reason the employer gave is the reason for the Claimant being suspended from her job. The employer told the Commission that the Claimant was placed on an unpaid leave of absence for failing to comply with their vaccination policy.

[11] The Claimant doesn't dispute that she was placed on an unpaid leave of absence for failing to comply with the employer's vaccination policy. However, the Claimant says there was no misconduct on her part.

[12] I find the Claimant was suspended from her job because she failed to comply with the employer's vaccination policy.

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

[13] The reason for the Claimant's dismissal is 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.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ 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.⁴

[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 suspended or let go because of that.⁵

[16] The Commission has to prove that the Claimant was suspended from 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 was suspended from her job because of misconduct.⁶

[17] The Commission says there was misconduct because the Claimant was aware of the employer's vaccination policy and that she would be suspended if she refused to follow the policy.

[18] The Claimant says there was no misconduct because didn't commit a type of misconduct like theft or assault.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was aware that if she wasn't vaccinated by the deadline (January 7, 2022) she would be placed on an unpaid leave of absence (GD3-51). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees who didn't comply with their policy would be placed on an unpaid leave of absence (GD3-23). I realize the Claimant argued that misconduct involved actions like theft or assault. However, I must apply the legal test for misconduct as explained above.

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

On this matter I must apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.⁷

Additional Testimony from the Claimant

[20] I recognize the Claimant further argued that the employer changed their vaccination policy numerous times over a period time. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.⁸

[21] I also realize the Claimant was denied a human rights exemption by the employer. Nevertheless, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction.

[22] The Claimant further testified that she did provide an attestation to the employer in November 2022 "under duress." However, the only issue before me is whether the Claimant was suspended from her job on January 7, 2022, because of misconduct. On this matter I must apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.⁹

[23] Finally, the Claimant testified that her suspension from employment had caused dire financial circumstances. I sympathize with the Claimant on this matter. However, I cannot ignore the law even for compassionate reasons.¹⁰

So, was the Claimant suspended from her job because of misconduct?

[24] Based on my findings above, I find the Claimant was suspended from her job because of misconduct.

⁷ *Knee v Canada (Attorney General)*, 2011 FCA 301.

⁸ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

⁹ *Knee v Canada (Attorney General)*, 2011 FCA 301.

¹⁰ *Knee v Canada (Attorney General)*, 2011 FCA 301.

Conclusion

[25] The Commission has proven the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[26] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section