



Citation: *JH v Canada Employment Insurance Commission*, 2022 SST 1746

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

Decision

Appellant: J. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (473925) dated May 19, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Teleconference

Hearing date: October 6, 2022

Hearing participant: Appellant

Decision date: October 14, 2022

File number: GE-22-2021

Decision

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

[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 disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. The Claimant's employer says that she was let go because she didn't follow the employer's mandatory vaccination policy. The employer says the Claimant didn't meet the requirements for a human rights exemption.

[4] The Claimant doesn't dispute that this happened.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[6] The Claimant says she disagrees that her actions are misconduct. She says her religious exemption should've been allowed. She says that her religion doesn't allow her to take an experimental vaccine.

[7] The Claimant says she follows other safety protocols, including masking, handwashing, and use of personal protective equipment (PPE). She says that when these protocols are followed, transmitting and contracting COVID-19 is very low. She says that even vaccinated people can transmit and contract COVID-19.

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

[8] The Claimant says she is relying on other laws, including the *Canadian Charter of Rights and Freedoms*, and another Tribunal case.²

Issue

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

Analysis

[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 that the Claimant lost her job because she didn't follow her employer's vaccination policy.

[12] The Claimant gave the Tribunal a copy of the employer's COVID-19 Immunization Policy. The policy is dated August 26, 2021 and updated on November 18, 2021. It says that employees must have the first dose of the vaccine by January 17, 2022. It says full vaccination must be done by February 7, 2022. The policy allows for a medical exemption. It allows for employees who aren't fully vaccinated to go to an education session on vaccination and test twice a week. If the policy isn't followed, it warns that disciplinary action will be taken, including termination.³

[13] The employer's policy was further updated, on December 16, 2021. The further updated policy requires all employees to be fully vaccinated.⁴

[14] The Claimant says that she learned about the further updated policy in December 2021 from her supervisor. In January 2022, while she was getting tested, she was told again that vaccination is mandatory. She says that testing was no longer an

² See *TC v Canada Employment Insurance Commission*, 2022 SST 891.

³ See GD8-6 to GD8-16.

⁴ See GD3-25.

option. She says the policy now requires mandatory vaccination. She says the employer didn't give religious exemptions.

[15] The Claimant says she didn't get vaccinated. She was placed on a two-week unpaid leave of absence on January 20, 2022. She was then dismissed.

[16] The employer wrote to the Claimant on February 3, 2022. The employer wrote that the Claimant is dismissed for cause, effective immediately. The employer wrote that the Claimant didn't receive her first dose of the vaccine.

[17] The Claimant says she didn't request a medical exemption. She says she has an allergy to the flu shot. Her family doctor told her to see an allergist. The allergist told her that she can be vaccinated under a doctor's supervision. She says she didn't provide the allergist's report to her employer. She says she didn't request a medical exemption to the policy.

[18] The Claimant says that she requested a religious exemption. Her religious leader wrote a letter, dated January 15, 2022, asking for an exemption from COVID-19 vaccination and testing on religious grounds. She gave her employer the letter from her religious leader.⁵

[19] The employer told the Commission that the policy includes an exemption based on human rights. The employer says the Claimant didn't meet the requirements for an exemption based on human rights.

[20] Based on this information, I find that it's undisputed that the Claimant was dismissed from her job because she didn't follow her employer's vaccination policy.

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

[21] The reason for the Claimant's dismissal is misconduct under the law.

⁵ See GD3-21 to GD3-25.

[22] To be misconduct under the law, 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

[23] 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

[24] 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.¹⁰

[25] The Claimant is a registered nurse. She worked for the employer for over 6 years. She worked in various rolls, including nursing. She says that she has a good work history and no disciplinary record. She says she has a good working relationship with co-workers, and patients and their family members.

[26] The Claimant testified that she knew that, if she didn't follow the policy, she could be dismissed. She says that she is also aware of her own religious beliefs, including that her religion doesn't allow her to take any experimental vaccine.

[27] The Claimant has an updated letter from her religious leader, dated March 25, 2022. The updated letter says her religion is against the use of any COVID-19 vaccine. She gave this letter to the Commission. She says she is unsure if she gave this updated letter to her employer.

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

[28] The Claimant says that her employer didn't answer her questions about vaccine safety. The Claimant wrote to the employer, in a letter dated January 19, 2022, with a number of questions. She says that the employer didn't respond to her letter.

[29] The Claimant says that there was no misconduct because her religious exemption should've been allowed. She says that her religion doesn't allow her to take an experimental vaccine.

[30] The Claimant says that masking, handwashing and use of PPE is a better strategy to vaccination. She says she wasn't allowed this option. She says that, even if she was vaccinated, she can still transmit and contract COVID-19.

[31] The Claimant says she is relying on other laws, including the *Canadian Charter of Rights and Freedoms*, and another Tribunal case.

[32] The Claimant says that she is in a very difficult financial situation. She is on social assistance but the money doesn't even cover her rent. She has three children and her husband is incapacitated.

[33] The Commission says there was misconduct because the Claimant was aware that failing to comply with the requirement to be vaccinated would end in termination.

[34] I find that the Commission has proven that there was misconduct, because the evidence shows that the Claimant knew about the policy, knew that she could be dismissed if she didn't follow the policy, and chose not to follow the policy. I find that her choice to not follow the policy was conscious, deliberate, and intentional. The Claimant testified she was aware of the policy and its consequences.

[35] In regards to the Claimant's arguments:

- a) *Employer denied religious exemption and contravened other laws, including the Canadian Charter of Rights and Freedoms.* I note that there are other forums for the Claimant to bring up these arguments. The conduct of the employer isn't a relevant consideration under section 30 of the EI Act. Rather, my analysis is focused on the Claimant's act or omission and whether that amounts to

misconduct within the meaning of section 30 of the EI Act.¹¹ I am not making decisions about whether the Claimant has any course of action under other laws. I can only look at whether the Claimant's actions were misconduct under the EI Act. However, I do note that the Claimant gave the Tribunal an email she received from the Ontario Nurses' Association (ONA). ONA says that it has filed grievances with employers on behalf of its members.¹²

- b) *Other Social Security Tribunal decision.* I find that this decision can be set apart on its facts. As well, other Tribunal decisions aren't binding on my decision. In the other Tribunal's decision, the Claimant was provided with only two days to follow the employer's vaccination policy. The Member held that the Claimant wasn't provided with enough time to follow the policy and couldn't have known he would be dismissed for his conduct. In this case, I find that the Claimant was provided with enough time to follow the policy. I find that the Claimant was provided with warnings that she would be dismissed if she didn't follow the policy.
- c) *Other safety protocols available.* I find that the employer has the ability to manage the day-to-day operations of the workplace. This includes developing and updating policies related to health and safety in the workplace. Once the employer applied a mandatory vaccination policy, it became a condition of employment.
- d) *The Claimant's financial situation.* I sympathise with the financial situation the Claimant and her family are facing. However, I can't change the law.¹³

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

[36] Based on my findings above, I find that the Claimant lost her job because of misconduct.

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

¹² See GD8-3.

¹³ See *Pannu v Canada (Attorney General)*, 2004 FCA 90.

Conclusion

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

[38] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section