



Citation: *RL v Canada Employment Insurance Commission*, 2023 SST 471

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

Decision

Appellant (Claimant): R. L.
Representative: C. A.

Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (489253) dated July 8, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: Teleconference
Hearing date: January 17, 2023
Hearing participant: Appellant

Decision date: January 18, 2023
File number: GE-22-3083

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and lost her job because of misconduct (in other words, because she did something that caused her to be suspended and lose her job). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits from September 20, 2021, to October 13, 2021, and disqualified from receiving EI benefits from October 10, 2021.¹

Overview

[3] The Claimant worked as an Attendant Service Worker and was placed on an unpaid leave of absence by the employer on September 13, 2021. The Claimant was then dismissed by the employer on October 14, 2021. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence and then let go because she didn't comply with their mandatory vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence and letting her go. It decided that the Claimant was suspended and lost her job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from September 20, 2021, to October 13, 2021, and disqualified from receiving EI benefits from October 10, 2021.

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

Section 31 of the *Employment Insurance Act* says a claimant who is suspended from her employment because of her misconduct is not entitled to receive EI benefits until the claimant 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.

[5] The Commission says the Claimant was aware that failing to comply with the employer's vaccination policy could lead to serious disciplinary consequences.

[6] The Claimant says that after a settlement agreement the employer amended her Record of Employment to layoff. The Claimant further says the Commission's refusal to pay her benefits was discriminatory.

Matters I have to consider first

The Claimant's representative wasn't at the hearing

[7] Before the hearing, the Claimant explained that her representative wouldn't be attending the hearing. The Claimant indicated she wished to proceed with the hearing without her representative. The Claimant then confirmed on the hearing recording that she wished to proceed without her representative. So, the hearing took place, but without the Claimant's representative.

Issue

[8] Was the Claimant suspended and dismissed from her job because of misconduct?

Analysis

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

Why was the Claimant suspended and dismissed from her job?

[10] I find the Claimant was suspended and dismissed from her job because she didn't comply with the employer's vaccination policy.

[11] The Commission says the reason the employer gave is the reason for the Claimant's suspension and dismissal. The employer told the Commission that the

Claimant was placed on unpaid leave of absence and dismissed because she didn't comply with their mandatory vaccination policy.

[12] The Claimant says the employer amended her Record of Employment to layoff in February 2022.

[13] I find the Claimant was suspended and dismissed because she didn't comply with the employer's vaccination policy. I realize the Claimant testified that her Record of Employment was amended to layoff. However, when the Claimant was initially placed on an unpaid leave of absence and then dismissed on October 14, 2021, the **reason** was because she didn't comply with the employer's vaccination policy. On this matter, I agree with the Commission that what transpired with the Claimant's union (and later resulted in an amendment of the Record of Employment) wasn't binding on me.

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

[14] The reason for the Claimant's suspension and dismissal is misconduct under the law.

[15] 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

[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 suspended and let go because of that.⁵

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.

[17] The Commission has to prove that the Claimant was suspended and 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 was suspended and lost her job because of misconduct.⁶

[18] The Commission says there was misconduct because the Claimant knew that refusing to comply with the employer's vaccination policy could lead to serious disciplinary consequences.

[19] The Claimant says there was no misconduct because after a settlement agreement the employer amended her Record of Employment to layoff. The Claimant further says that colleagues with the same circumstances as herself received EI benefits.

[20] I find the Commission has proven there was misconduct, because they showed the Claimant was aware of the employer's vaccination policy and the consequences for not complying with the policy (GD3-43). Furthermore, the Commission provided a copy of the employer's vaccination policy which indicated that non-compliance would lead to an unpaid leave of absence and/or dismissal (GD3-48). I realize the Claimant argued that refusing not to receive an experimental vaccine wasn't misconduct. However, I must apply the legal test for misconduct as established in the case law. In other words, I cannot ignore the law even in the most sympathetic cases.⁷

Additional Testimony from the Claimant

[21] I realize the Claimant testified that her union reached a settlement agreement with the employer and her Record of Employment was amended to layoff. However, I agree with the Commission that just because a settlement was reached wouldn't determine whether the Claimant was suspended and then dismissed for misconduct. I

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

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

further agree with the Commission that this was especially the case where there was sufficient documentary evidence to justify a finding of misconduct.⁸

[22] I further recognize the Claimant disagreed with the Commission's submission that there was work available in September 2021 if she was vaccinated. However, I agree with the Commission on this matter because they supported their position with two direct statements from the employer listed in the Appeal Record. First: The employer (X) told the Commission they had enough work, but they couldn't offer the Claimant any job because she wasn't vaccinated (GD3-33). Second: The employer (X) told the Commission **there was work available** and the Claimant would have been working if she had complied with the vaccination policy (GD3-45).

[23] I also recognize the Claimant argued she should qualify for EI benefits because colleagues with the same circumstances as herself qualified. However, I cannot comment on other cases because the circumstances might be different and wouldn't be known to me.

[24] The Claimant also made a general reference to a decision from the General Division of the Social Security Tribunal. The Claimant explained that this General Division decision overturned the Commission's finding of misconduct in a vaccination appeal. However, decisions from the General Divisions were not legal precedent and therefore not binding on me.

[25] Finally, the Claimant argued that refusing to receive an experimental vaccine wasn't misconduct. 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.⁹

⁸ *Morris v. Canada (attorney General)*, (A-291-98).

⁹ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

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

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

Conclusion

[27] The Commission has proven the Claimant was suspended and lost her job because of misconduct. Because of this, the Claimant was disentitled from receiving EI benefits from September 20, 2021, to October 13, 2021, and disqualified from receiving EI benefits from October 10, 2021.

[28] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section