



Citation: *CK v Canada Employment Insurance Commission*, 2022 SST 1764

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

Decision

Appellant:

C. K.

Respondent:

Canada Employment Insurance Commission

Decision under appeal:

Canada Employment Insurance Commission
reconsideration decision (462434) dated March 29, 2022
(issued by Service Canada)

Tribunal member:

Amanda Pezzutto

Decision date:

September 15, 2022

File number:

GE-22-1548

Decision

[1] C. K. is the Claimant. The Canada Employment Insurance Commission (Commission) says she can't get Employment Insurance (EI) benefits. The Claimant disagrees with this decision, so she is appealing to the Social Security Tribunal (Tribunal).

[2] I am summarily dismissing the Claimant's appeal. Her appeal has no reasonable chance of success. There is no argument the Claimant could make that would let me allow her appeal.

Overview

[3] The Claimant worked for an airline. Her employer introduced a vaccination policy. Her employer told her she had to provide proof of vaccination against COVID-19 to remain in her job. The employer asked her to provide proof of vaccination by October 30, 2021. The Claimant wasn't vaccinated by the employer's deadline. So, the employer suspended her.

[4] The Claimant says she didn't stop working because of misconduct. She says this is because her employer changed the conditions of her employment by requiring vaccination. She says her employer should have granted her an exemption from the vaccination policy for spiritual reasons. She says she has real fears about the safety of the COVID-19 vaccine.

[5] The Commission says the Claimant was suspended because of misconduct. The Commission says the Claimant knew that her employer required her to be vaccinated against COVID-19. The Commission says the Claimant knew she couldn't work if she wasn't vaccinated.

Matters I must consider first

[6] Before I summarily dismiss an appeal, I have to give the Claimant notice. I have to allow her a reasonable period to make arguments about whether I should summarily dismiss the appeal.¹

[7] Tribunal staff sent an email to the Claimant on August 11, 2022. In this letter, I explained why I was considering summarily dismissing her appeal. I asked her to respond to the letter by August 23, 2022. I asked her to make detailed written submissions explaining why she thought her appeal had a reasonable chance of success.

[8] The Claimant responded to my letter. She said she thought her appeal had a reasonable chance of success. She asked for a hearing to explain her arguments. But the Claimant didn't explain why she thought her appeal had a reasonable chance of success. For instance, she didn't give any new facts or arguments about her reasons for losing her job. She didn't explain what kind of new information she had that would show that her appeal has a reasonable chance of success.

[9] I know the Claimant wants a hearing. But the law says I must summarily dismiss an appeal if there is no reasonable chance of success. I don't think the Claimant's response gives me any new information that shows me that her appeal has a reasonable chance of success.

[10] So, I will make a decision based on the evidence I have before me.

Issue

[11] I must decide whether I should summarily dismiss the Claimant's appeal. To make this decision, I have to decide if her appeal has a reasonable chance of success.

¹ Section 22 of the *Social Security Tribunal Regulations*

Analysis

[12] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.²

[13] This is what “no reasonable chance of success” means: is it plain and obvious, on the face of the record, that the Claimant’s appeal is bound to fail? Are there any arguments or evidence that the Claimant could present at a hearing that would lead to a successful appeal?³

[14] The law says you can’t get EI benefits if you lose your job because of misconduct. This applies whether the employer has suspended or dismissed you.⁴

[15] If you are suspended from your job because of misconduct, you are disentitled from receiving EI benefits. The disentitlement lasts until one of the following things happens:

- Your suspension ends;
- You lose your job or quit your job; or
- You work enough hours with another job to start a new claim for EI benefits.⁵

[16] To be misconduct under the law, your conduct has to be wilful. This means that your conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ You don’t have to have wrongful

² Section 53(1) of the *Department of Employment and Social Development Act*.

³ In coming to this interpretation, I am relying on an Appeal Division decision, *J.S. v. Canada Employment Insurance Commission*, 2015 SSTAD 1132, and a Federal Court of Appeal decision, *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147.

⁴ Section 30 of the *Employment Insurance Act* says you are disqualified from receiving benefits if you are dismissed because of misconduct. Section 31 of the *Employment Insurance Act* says you are disentitled from receiving benefits if you are suspended because of misconduct.

⁵ Section 31 of the *Employment Insurance Act*.

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

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

intent (in other words, you don't have to mean to be doing something wrong) for your behaviour to be misconduct under the law.⁸

[17] There is misconduct if you knew or should have known that your conduct could get in the way of carrying out your duties towards your employer and that there was a real possibility of suspension or dismissal because of that.⁹

[18] The Commission has to prove that the employer suspended you because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not that you lost your job because of misconduct.¹⁰

[19] The Claimant argues that she didn't lose her job because of misconduct. She says her employer changed the conditions of her employment. She says it was her right to refuse to be vaccinated against COVID-19. She says that her employer should have given her an exemption from the vaccination policy for spiritual reasons.

[20] The Commission says that the Claimant stopped working because of misconduct. The Commission says she knew about her employer's requirement to be vaccinated against COVID-19. The Commission says she knew that her employer would suspend her if she wasn't vaccinated against COVID-19 by the deadline of October 30, 2021.

[21] I agree with the Commission. I find that this appeal has no reasonable chance of success. This is because I find that the Claimant lost her job because of misconduct. There is no argument or evidence that would lead me to a different conclusion.

[22] The Claimant and the Commission agree on many of the basic facts about the vaccine policy requirement and the deadline. The Claimant agrees that her employer introduced a policy that required her to be vaccinated against COVID-19. She agrees that the employer first told her about the policy in August 2021. She knew that the

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.

deadline for vaccination was October 30, 2021. She knew that the employer wouldn't let her keep working if she wasn't vaccinated against COVID-19.

[23] The Claimant says she chose not to be vaccinated against COVID-19. She says she disagrees with the employer's vaccine policy. She opposes the COVID-19 vaccine for spiritual and health reasons. She says her employer changed the conditions of her employment by requiring her to be vaccinated against COVID-19.

[24] But it is not up to the Tribunal to decide if the employer acted fairly by introducing a vaccination policy.¹¹ It is not up to the Tribunal to decide if the COVID-19 vaccine is safe or effective. I can't make decisions about whether the employer should have granted her a spiritual exemption. And I can't make decisions about whether the employer violated the terms of the Claimant's collective agreement. The Claimant can pursue other measures through a human rights tribunal or her union if she wants to make these arguments.

[25] My only role is to decide if the Claimant's appeal is bound to fail, no matter what arguments or evidence she could present at a hearing. And I find that this appeal is bound to fail. This is because the Claimant lost her job because of misconduct, under the meaning of the *Employment Insurance Act*. The Claimant and the Commission agree about the following:

- The employer suspended the Claimant because she wasn't vaccinated against COVID-19.
- The Claimant knew her employer had a policy requiring all employees to be vaccinated against COVID-19 by October 30, 2021. Even so, she deliberately chose to refuse the COVID-19 vaccine.
- The Claimant knew her employer would suspend her if she didn't follow their vaccination policy.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34.

[26] If I accept all of these facts, then I have to find that the employer suspended the Claimant because of misconduct. The Claimant's failure to follow the vaccination policy led directly to her suspension. She acted deliberately. She knew her actions were likely to lead to suspension.

[27] Based on these facts, there is no argument that the Claimant could make that would lead me to a different conclusion. There isn't any evidence that contradicts these facts. Her appeal is bound to fail, no matter what arguments or evidence she could provide at a hearing.

Conclusion

[28] I find that the Claimant's appeal has no reasonable chance of success. So, I must summarily dismiss her appeal.

Amanda Pezzutto
Member, General Division – Employment Insurance Section