



[TRANSLATION]

Citation: *IH v Canada Employment Insurance Commission*, 2023 SST 876

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

Decision

Appellant: I. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (544953) dated November 1, 2022 (issued by Service Canada)

Tribunal member: Josée Langlois

Type of hearing: Videoconference

Hearing date: April 6, 2023

Hearing participant: Appellant

Decision date: April 13, 2023

File number: GE 22-3977

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant temporarily stopped working because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Commission could not pay her Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant works for the government of X. She stopped working between April 5, 2022, and June 20, 2022, because she refused to provide a COVID-19 vaccination attestation in accordance with the employer's policy.

[4] The Commission accepted the employer's explanations. It found that the Appellant was suspended because of misconduct. It could not pay her EI benefits between April 5, 2022, and June 17, 2022.

[5] The Appellant disagrees with the Commission's decision. She admits that she didn't provide her employer with a COVID-19 vaccination attestation, but she explains that the employer unilaterally adopted a vaccination policy for all employees, even those who were teleworking. The Appellant refused to disclose her vaccination status.

[6] I have to decide whether the Appellant was suspended from her job because of misconduct.

Issues

[7] Did the Appellant refuse to comply with the employer's vaccination policy?

[8] If so, does this act amount to misconduct?

¹ Section 31 of the *Employment Insurance Act* (Act) says that a claimant who is suspended from their job because of misconduct isn't entitled to receive Employment Insurance (EI) benefits until the end of the suspension period.

Analysis

[9] To decide whether the Appellant temporarily stopped working because of misconduct, I have to decide two things. First, I have to decide why the Appellant temporarily lost her job. Then, I have to decide whether the *Employment Insurance Act* (Act) considers that reason to be misconduct.

Did the Appellant refuse to comply with the employer's vaccination policy?

[10] I find that the Appellant was suspended from her job because she refused to comply with the employer's vaccination policy. In accordance with this policy, she had to provide the employer with proof of COVID-19 vaccination by March 21, 2022, and she refused to do so. (The policy required employees to provide the attestation earlier, but the Appellant was on medical leave from November 3, 2021, to March 7, 2022. The employer asked her to provide the attestation or offered her to ask for an exemption from being vaccinated when she would return from medical leave by March 21, 2022).

[11] The Record of Employment sent by the employer to the Commission shows that the Appellant is on unpaid leave because she didn't comply with the vaccination policy. The employer asks the Commission to consider that the Appellant was suspended or let go.

[12] At the hearing, the Appellant indicated that she was on administrative leave during that period and not on leave because of a disciplinary measure.

[13] As the Commission argues, it was the employer who initiated putting the Appellant on a leave of absence. This meant that the Appellant could not choose whether to leave or stay. Also, the employer is asking that the administrative leave be treated as an "M"—a dismissal or suspension.

[14] The Appellant admits that she refused to comply with the employer's policy that required her to provide a COVID-19 vaccination attestation. I find that she was suspended for this reason and that she did what the employer says she did.

Is the reason for the Appellant's suspension misconduct under the Act?

[15] The reason for the Appellant's suspension is misconduct under the Act. A worker who is suspended because of misconduct can't receive EI benefits until the end of the suspension period.²

[16] To be considered misconduct under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ The Appellant 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 Act.⁵

[17] There is misconduct if the Appellant 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.⁶

[18] The Commission has to prove, on a balance of probabilities, that the Appellant stopped working because of misconduct. This means that she has to show that it is more likely than not that the Appellant was suspended because of misconduct.⁷

[19] The employer adopted a mandatory COVID-19 vaccination policy.⁸ In accordance with this policy, employees had to provide a COVID-19 vaccination attestation by December 14, 2021. Since the Appellant was on medical leave until March 7, 2022, the employer asked her to provide the attestation by March 21, 2022. Considering that she had to attend a training session on COVID-19 vaccination, the employer sent her a letter on March 4, 2022, saying that she would be placed on unpaid leave on April 4, 2022, if she hadn't submitted the COVID-19 vaccination attestation.

² Section 31 of the Act.

³ See *Mishibinijima v Attorney General of Canada*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General v Secours*, A-352-94.

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

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁸ See the document *on the Policy on COVID-19 Vaccination for Parks Canada* at GD3-46 et seq.

[20] On April 5, 2022, the Appellant still hadn't provided a vaccination attestation like the employer required and she was suspended. The employer says that the Appellant had known since November 2021 that she had to provide the attestation and that she knew the consequences if she didn't.

[21] The Appellant admits that she was told about the employer's vaccination policy and the consequences of not complying. She says that she refused to provide the employer's COVID-19 vaccination attestation because she considers it highly private information.⁹

[22] She says that the employer unilaterally changed her employment conditions. Her employer found that she was in breach of this policy, but she says that it was satisfied with her work.

[23] The Appellant says that the information she had in April 2022 showed that it wasn't necessary to be vaccinated. She was in good health and she didn't want to take that risk. She says that she knows people who died or got sick after being vaccinated.

[24] On this point, the Appellant says that the employer's policy wasn't supported by science or the need for security.¹⁰ She says that vaccine development can usually take anywhere from 10 to 15 years, and by the time the employer asked for this attestation, clinical trials for the COVID-19 vaccine hadn't been completed. She explains that she refused to provide the requested attestation not to cause harm to her employer, but because she wanted to protect her health. On this point, she argues that she has the right to refuse medical treatment and that forcing employees to get vaccinated is coercion.

[25] The Appellant also says that her situation was low-risk for spreading the virus because she was working from home. She says that she didn't make many trips to the workplace and when she did, she followed health measures.

⁹ GD3-8.

¹⁰ GD3-18.

[26] The Appellant says that she didn't commit misconduct because she was doing her job well. On this point, she argues that, according to her manager, she was on administrative leave and not suspended because of a disciplinary measure.¹¹

[27] The Commission argues that the Appellant was informed of the employer's vaccination policy and that she knew that there would be consequences if she didn't comply with that policy. It says that the Appellant didn't apply for an exemption from COVID-19 vaccination for a reason protected by the *Canadian Charter of Rights and Freedoms*. So, it argues that the Appellant's refusal to comply with the COVID-19 vaccination policy amounts to misconduct.

[28] The Commission also says that the employer can adopt a COVID-19 vaccination policy, regardless of the workplace, to reduce the risk of spreading the virus. On this point, it says that, even though the policy was adopted after the Appellant was hired, it can be considered reasonable given the context of the COVID-19 pandemic.

[29] Finally, the Commission says that the Tribunal doesn't have jurisdiction to decide whether the employer's policy was fair or reasonable or whether the employer should have proposed alternative measures.

[30] I agree with the Commission. The question of whether the employer's policy is reasonable or whether the employer should offer additional accommodation to an employee who, for example, is working remotely, must be decided by another forum.¹² The Federal Court of Appeal has said that the Tribunal must focus on the conduct of the claimant and not the employer. On this point, there is **misconduct where the claimant knew or ought to have known that his conduct was such as to impair the performance of the duties owed to his employer and that, as a result, dismissal was a real possibility.**¹³

¹¹ GD3-41.

¹² *Paradis v Attorney General of Canada*, 2016 FC 1282.

¹³ *Nelson v Attorney General of Canada*, 2019 FCA 222 (CanLII).

[31] So, by refusing to comply with the employer's policy, the Appellant could assume that being suspended from her duties was a possibility. While I understand the Claimant's explanations, when a claimant voluntarily doesn't comply with an employer's policy, this behaviour gets in the way of carrying out their duties toward their employer.

[32] By not complying with the employer's COVID-19 vaccination policy, the Appellant committed misconduct under the Act because she knew that she could be suspended from her duties if she didn't provide a COVID-19 vaccination attestation to the employer, and she wilfully didn't do so.

[33] I have reviewed the documents submitted by the Appellant prior to the hearing and specifically *AL v Canada Employment Insurance Commission*.¹⁴ In that particular case, the employees' collective agreement had been renegotiated to include a mandatory vaccination policy, which isn't what happened here. I also note that the Commission appealed to the Tribunal's Appeal Division in that file and was given permission to appeal on February 9, 2023.

[34] Also, while I understand that this vaccination policy wasn't in effect when the Appellant was hired, this is about a new directive that was adopted because of the COVID-19 pandemic. The employer gave certain exemptions, such as the medical exemption, that employees could use. As the Appellant indicated, she had no reason to ask for a medical or religious exemption and she didn't do so. But, she didn't want to disclose her vaccination status to her employer.

[35] As mentioned, the issue isn't whether the suspension was an appropriate measure. The issue is whether not complying with the employer's vaccination policy amounts to misconduct under the Act. Like the Court has said, it isn't relevant to analyze, for the purposes of misconduct, whether the employer should have proposed other measures. In this case, the issue is whether the alleged misconduct was the reason she was suspended.¹⁵ This is the case. And, I don't have the authority to

¹⁴ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

¹⁵ *Attorney General of Canada v Mishibinijima*, 2007 FCA 85 (CanLII).

determine whether **the severity of the employer's penalty was justified, or whether the employee's behaviour constituted good cause for dismissal** (in this case suspension).¹⁶ But, I am making this decision on a balance of probabilities, and in doing so, I am considering all of the relevant facts.

[36] On this point, while I understand the Appellant's explanations about her vaccination status being personal and confidential, I note that she had the right to refuse to comply with the employer's directive. But, if she refused to comply with that directive, there were consequences, and she knew that.

[37] For a finding of misconduct, the action must be wilful, deliberate, or intentional. Even though the Appellant didn't want the consequences that followed—in this case, being suspended—she wilfully chose not to provide her vaccination status to the employer. She had been told about the policy and about the consequences of not complying.

[38] Like I have mentioned, wrongful intent doesn't have to be proven to find an act to be wilful under the Act. **Only the action needs to be wilful to constitute misconduct, and it may be so even if the effects are not intended.**¹⁷

[39] The Appellant was suspended by her employer because she didn't follow the rules it issued. She refused to comply with the mandatory vaccination policy for all employees (unless she provided a medical or religious exemption). By refusing to provide an attestation of her vaccination status, the Appellant isn't complying with the employer's rules and she isn't carrying out the duties of her job.

[40] The Appellant admits that she received clear instructions from the employer about the vaccination policy. She knew the rules and decided not to follow them. This wilful act amounts to misconduct.

¹⁶ *Attorney General of Canada v Marion*, 2002 FCA 185 (CanLII).

¹⁷ *Attorney General of Canada v Tucker*, A-381-85.

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

[41] The Appellant can't receive regular benefits if she is suspended for misconduct. When an employee doesn't follow their employer's rules, they can assume that they will be suspended or even let go.

[42] Based on my findings above, I am of the view that the Appellant did what the employer says she did, and that refusing to comply with the employer's mandatory vaccination policy amounts to misconduct under the Act.

Conclusion

[43] The Commission has proven that the Appellant stopped working because of misconduct. Because of this, she can't receive EI benefits during this period.

[44] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section