



Citation: *NH v Canada Employment Insurance Commission*, 2023 SST 646

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

Decision

Appellant: N. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (489079) dated June 28, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: January 10, 2023

Hearing participant: Appellant

Decision date: March 8, 2023

File number: GE-22-2645

Decision

[1] N. H. is the Appellant. The Canada Employment Insurance Commission (Commission) says she can't get Employment Insurance (EI) benefits. The Commission says she stopped working because of misconduct. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Appellant's appeal. I find that the reason she stopped working is misconduct under the meaning of the *Employment Insurance Act*. This means she can't get EI benefits.

Overview

[3] The Appellant worked in health care. Following a provincial health order, her employer introduced a COVID-19 vaccination policy. Under the policy, the employer expected all employees to show proof of vaccination by a deadline. The Appellant didn't give her employer proof of vaccination against COVID-19 by the deadline. So, her employer put her on an unpaid leave of absence and then dismissed her three weeks later.

[4] The Commission says this means that the Appellant lost her job because of misconduct. The Commission says she knew about her employer's COVID-19 vaccination policy and knew she could lose her job if she didn't follow the policy. The Commission says she acted deliberately when she decided not to follow the employer's policy.

[5] The Appellant disagrees. She says her employer wasn't clear about its expectations under the policy and wasn't clear about the consequences if she didn't follow the policy. She also says that the employer's policy wasn't really a policy because it was following a public health order. And she says the public health order violated the terms of her collective agreement.

Issue

[6] Did the Appellant stop working because of misconduct?

Analysis

[7] To answer the question of whether the Appellant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Appellant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant stop working?

[8] I find that the Appellant stopped working because she didn't follow her employer's COVID-19 policy.

[9] The Commission says the Appellant's employer suspended her and dismissed her because she didn't follow the employer's COVID-19 vaccination policy. The Commission says she didn't give them proof of vaccination against COVID-19 by the deadline.

[10] The Appellant disagrees. She says her employer wasn't clear about its expectations. She also says that the COVID-19 vaccination requirement wasn't a policy.

[11] I agree with the Commission. I find that the Appellant stopped working because of the employer's COVID-19 vaccination policy. I will call it a policy because this best describes how the employer set out its expectations about vaccination.

[12] Even though the Appellant says her employer wasn't clear about its expectations, I don't think the evidence in the appeal file supports her argument. There are many emails between the employer and the Appellant and I think these emails show that the employer clearly explained its expectations.

[13] For example, in an email on October 19, 2021, the employer told the Appellant that all employees had to show that they had received at least one dose of a COVID-19 vaccination by October 25, 2021. The email says the employer would put employees on an unpaid leave of absence if they didn't show proof of vaccination by the deadline. The

email also says that the employer would dismiss any employees who still hadn't shown proof of vaccination by November 15, 2021.¹

[14] The Appellant stopped working on October 26, 2021 and she agrees that her employer dismissed her a few weeks later. So, the dates the Appellant stopped working line up with the dates the employer set out in its emails to the Appellant. This makes me think the Appellant probably stopped working because she didn't follow the employer's COVID-19 vaccination policy.

[15] Furthermore, there isn't any evidence in the appeal file that makes me think the employer suspended or dismissed the Appellant for any other reason. The Appellant hasn't given me evidence showing that she stopped working for any reason, other than her failure to follow the employer's COVID-19 vaccination policy.

[16] So, I find that the Appellant stopped working because of her employer's COVID-19 vaccination policy. I find that her employer suspended her by putting her on an unpaid leave of absence and then dismissed her a few weeks later. But the Appellant's benefit period starts on December 5, 2021, after her employer already dismissed her. So, I will only look at the question of whether the reason for her dismissal is misconduct under the meaning of the law.

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

[17] I find that the reason for the Appellant's dismissal is misconduct under the meaning of the law.

[18] 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 Appellant doesn't have to have

¹ GD3-55

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

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

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

[19] 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 let go because of that.⁵

[20] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.⁶

[21] The Commission says the Appellant lost her job because of misconduct. The Commission says she knew about her employer's COVID-19 vaccination policy and knew that she couldn't continue working if she didn't follow the policy. The Commission says she acted deliberately when she decided not to follow her employer's policy.

[22] The Appellant disagrees. She says her employer's policy was illegal and violated the terms of her collective agreement. She says her employer can't coerce her into taking medical treatment. She says her employer wasn't clear about its expectations or the consequences if she didn't follow the employer's policy.

[23] I agree with the Commission. I find that the reason the Appellant lost her job is misconduct under the meaning of the law.

[24] I understand that the Appellant argues that her employer wasn't clear about the policy, its expectations, or the consequences if she didn't follow the policy. But I don't think the evidence in the appeal file supports the Appellant's arguments. I find that the employer clearly explained its expectations and clearly told the Appellant about the consequences if she didn't follow the policy.

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.

[25] The Commission included a copy of the employer's policy in the appeal file. The policy says that employees can't work if they don't show proof of vaccination against COVID-19 by the deadline. I think this clearly shows that the employer expected the Appellant to show proof of vaccination by the deadline. I also think this shows that the employer told the Appellant that she couldn't keep working if she didn't show proof of vaccination against COVID-19 by the deadline.

[26] And I think the employer explained its expectations and the consequences even more clearly in emails directly to the Appellant. For example, in an email on October 19, 2021, the employer told the Appellant that any staff who didn't show proof of vaccination against COVID-19 by October 26, 2021 would be put on an unpaid leave of absence and then terminated on November 15, 2021. I think this is a clear explanation of the employer's expectations and consequences. So, I find that the Appellant reasonably should have known that she would lose her job if she didn't show her employer proof of vaccination by the deadline.

[27] The Appellant has made many arguments about whether the employer's policy was fair or whether the employer broke the terms of her collective agreement by introducing a COVID-19 vaccination policy. But case law says I can't consider the employer's actions. I can't make decisions about whether her employer acted fairly or whether her employer violated the terms of her collective agreement. I can only look at the Appellant's own actions and decide if the reason she stopped working is misconduct under the meaning of the law.⁷

[28] And I find that the reason the Appellant lost her job is misconduct under the meaning of the law. This is because:

- I find the Appellant's employer clearly explained its expectations under its COVID-19 policy. The employer told the Appellant that it expected her to show proof of vaccination against COVID-19 by a deadline.

⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34. Also see *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

- The employer clearly explained the consequences if the Appellant didn't follow the policy. The employer told the Appellant that it would put her on an unpaid leave of absence and then dismiss her. So, I find the Appellant reasonably should have known that she would lose her job if she didn't follow the policy.
- The Appellant didn't show her employer proof of vaccination against COVID-19 by the deadline. The Appellant made this decision deliberately.
- The Appellant's failure to follow her employer's COVID-19 vaccination policy was the only reason she lost her job.

[29] So, I find that the Appellant lost her job because of misconduct, under the meaning of the law.

Conclusion

[30] I am dismissing the Appellant's appeal. I find that she lost her job because of misconduct, under the meaning of the law. This means she can't get EI benefits starting December 5, 2021.

Amanda Pezzutto
Member, General Division – Employment Insurance Section