



Citation: *EM v Canada Employment Insurance Commission*, 2023 SST 658

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

Decision

Appellant: E. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (513128) dated August 25, 2022 (issued by Service Canada)

Tribunal member: Suzanne Graves

Type of hearing: In person

Hearing date: February 24, 2023

Hearing participant: Appellant

Decision date: March 10, 2023

File number: GE-22-3090

Decision

[1] The appeal is dismissed. The reasons for my decision are set out below.

[2] The Canada Employment Insurance Commission (Commission) has proved that the Appellant was suspended and later dismissed from her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant can't receive Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant was dismissed from her job as a nurse on January 10, 2023. The Appellant's employer told the Commission she was let go because she went against its vaccination policy: she didn't get vaccinated.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job because of misconduct. It says she acted deliberately when she decided not to take the vaccine and knew she was likely to lose her job because of that decision. As a result, the Commission decided that she is disqualified from receiving EI benefits from March 27, 2022, the date of her renewal application for regular benefits.²

[5] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct. She says that she had serious health concerns about the safety of the vaccine, especially since she has underlying health conditions.

[6] The Appellant also argues that her employment contract specifically recognizes an employee's right to refuse vaccines. She is appealing the Commission's decision to the Social Security Tribunal (Tribunal).

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

² The Commission's initial decision is at GD3-21. The reconsideration decision maintaining that decision is at GD3-45.

Matters I have to consider first

The employer is not a party to the appeal

[7] Sometimes the Tribunal sends the Appellant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal wrote to the Appellant's employer asking if they wished to be added as a party, but it did not reply to that letter.³

[8] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party as there is no evidence to show that it has a direct interest in the outcome of this appeal.

Documents received at the hearing

[9] At the hearing, the Appellant filed a copy of a document issued by the Ontario Nurses' Association. I accepted the document as evidence as it is relevant to the issues in this appeal. After the hearing, the Tribunal sent the document to the Commission and allowed it time to respond. The Commission made no arguments in reply.

Issue

[10] Did the Appellant lose her job because of misconduct?

Analysis

[11] In Canada, there are a number of laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). These laws include the *Canadian Bill of Rights*, and a number of other laws that protect rights and freedoms.

[12] The Tribunal isn't allowed to consider whether an action taken by an employer violates a claimant's rights or to make rulings based on the *Canadian Bill of Rights*, the *Canadian Human Rights Act* or any of the other laws that protect rights and freedoms. You must go to a different tribunal or a court to address this issue.

³ The Tribunal's notice to the employer is at GD5.

[13] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.⁴ My role is to decide whether a claimant is disqualified from receiving EI benefits because they lost their employment due to misconduct.

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

Why did the Appellant lose her job?

[15] The Appellant lost her job because she went against her employer's COVID-19 vaccination policy.

[16] The Commission says that the Appellant was dismissed because she failed to get vaccinated as required by the employer's immunization policy.

[17] The Appellant doesn't dispute that the employer dismissed her for refusing to get vaccinated. But she says that she never consented to the employer's vaccination requirement and had health concerns about taking it. She also says the policy was in direct conflict with her employment contract.

[18] I find that the Appellant was dismissed because she did not comply with the employer's vaccination policy.

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

[19] The *Employment Insurance Act* (EI Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's dismissal is misconduct under the EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

⁴ See sections 30 and 31 of the EI Act.

[20] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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 law.⁷

[21] 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.⁸

[22] The law doesn't say I have to consider how the employer behaved.⁹ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the EI Act.¹⁰

[23] I have to focus on the EI Act only. I can't make any decisions about whether the Appellant has options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for her aren't for me to decide.¹¹

[24] I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the EI Act.

[25] 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.¹²

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁹ See section 30 of the EI Act.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Minister of Employment and Immigration v Bartone*, A-369-88.

The Commission's argument

[26] The Commission says there was misconduct because:

- the employer had a vaccination policy
- the employer clearly notified the Appellant about its expectations about getting vaccinated
- the employer sent letters to the Appellant to communicate what it expected
- the Appellant knew or should have known what would happen if she didn't follow the policy

The Appellant's argument

[27] The Appellant argues there was no misconduct. She says that the vaccine is experimental, and that medical coercion is illegal. She testified that she had serious health concerns about the vaccine. She says that she personally witnessed emergency health effects that patients experienced after getting the vaccine and she couldn't get all the necessary information about the potential health risks.

[28] Given her medical history, the Appellant says she was particularly concerned that she might experience adverse health consequences, even death, after taking it.¹³ She testified that her doctor wouldn't give her a medical exemption, citing fears about losing her medical licence for issuing exemptions. She didn't request an exemption from her employer, as she believed it wouldn't be granted.

[29] The Appellant says that her dismissal is contrary to the terms of her employment agreement and asked me to consider another decision of the General Division of this Tribunal (2022 SST 1428).¹⁴ In that case, the Tribunal decided that the Commission didn't prove that the Appellant had breached an expressed or implied duty arising out of their employment contract. She also notes that a document issued by the Ontario Nurses' Association also recognizes the right to refuse any required vaccine.¹⁵

¹³ The Appellant makes these arguments at GD2-5.

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

¹⁵ See GD6-91.

My findings

[30] I find that the reason the Appellant lost her job is misconduct under the law.

[31] The employer's vaccination policy states that all employees must be fully vaccinated against COVID-19 by November 29, 2021.¹⁶ The employer sent a letter to the Appellant dated December 14, 2021, stating that employees who have not provided proof of vaccination by January 10, 2022, will be terminated.¹⁷ The Appellant was dismissed from her job effective January 10, 2022.

[32] The Appellant doesn't dispute that the employer informed her about the vaccination policy requirements and the consequences of not following them.¹⁸

[33] The Appellant's employer decided, in the context of a global pandemic, to follow public health recommendations to change the terms of employees' contracts to impose a vaccination policy. This policy required its employees to be vaccinated against COVID-19. It is well-established law that a deliberate violation of an employer's policy is considered misconduct within the meaning of the EI Act.¹⁹

[34] An employer has a right to manage their daily operations, which includes the authority to develop and implement policies at the workplace. When the employer implemented this policy as a requirement for all of its employees, the policy became a condition of the Appellant's employment.

[35] I acknowledge the recent decision of the General Division of this Tribunal in 2022-SST-1428. But the courts and the Tribunal's Appeal Division have held, in similar circumstances, that the Tribunal is not the appropriate forum through which a claimant can obtain the remedy they are seeking.

¹⁶ The Commission filed a copy of a letter dated October 15, 2021, from the employer to hospital staff setting out this date, and a link to the vaccination policy. (GD3-40)

¹⁷ See GD3-26.

¹⁸ On September 2, 2021, the employer's letter to employees (GD3-29 to 35) stated that failure to adhere to the policy "could result in disciplinary action, up to and including termination, loss of privileges or placement." (GD3-35)

¹⁹ *Canada (Attorney General) v Bellavance*, 2005 FCA 87.

[36] Questions about whether the employer's policy had any effect on occupational health and safety, whether it violated her contract of employment, or whether it breached the Appellant's human rights are not matters for me to decide.²⁰

[37] I find that the Commission has proved there was misconduct because the employer had a vaccination policy that required all employees to be vaccinated against COVID-19. The employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated. So, the Appellant knew or should have known the consequence of not following the employer's vaccination policy.

[38] I have compassion for the Appellant's situation, but I have to follow the rules set out in the EI Act and cannot make exceptions for special cases on the basis of compassion.²¹

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

[39] Based on my findings above, I find that the Appellant lost her job because of misconduct. This is because the Appellant's actions led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

Conclusion

[40] The Commission has proved that the Appellant lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI regular benefits.

[41] This means that the appeal is dismissed.

Suzanne Graves

Member, General Division – Employment Insurance Section

²⁰ In *Paradis v Canada (Attorney General)*, 2016 FC 1282, the claimant argued that the employer's policy violated his rights under the *Alberta Human Rights Act*. The Court found that it was a matter for another forum. See also *MM v Canada Employment Insurance Commission*, AD-22-919.

²¹ In *Canada (Attorney General) v Lévesque*, 2001 FCA 304, the Federal Court of Appeal held that the legislation has to be followed, regardless of the personal circumstances of the appellant (see also *Pannu v Canada (Attorney General)*, 2004 FCA 90).