



Citation: *SA v Canada Employment Insurance Commission*, 2023 SST 711

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

Decision

Appellant: S. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (513712) dated August 20, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Teleconference

Hearing date: March 7, 2023

Hearing participant: Appellant

Decision date: March 8, 2023

File number: GE-22-3141

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost her job. The Appellant's employer says that she was let go because she went against its vaccination policy: she didn't get vaccinated.

[4] Even though the Appellant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

[6] The Appellant says that the employer should have allowed her a religious exemption to the policy. She says that the policy is against several laws and legal principles. She says that the vaccine doesn't prevent transmission and is unsafe.

Issue

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

¹ Section 31 of the *Employment Insurance Act* (Act) says that Appellants who are suspended from their job because of misconduct are disentitled from receiving benefits.

Analysis

[8] 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.²

[9] To answer the question of whether the Appellant lost her job 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?

[10] I find that the Appellant lost her job because she went against her employer's vaccination policy.

[11] The Appellant doesn't dispute this happened.

[12] The Commission says the Appellant lost her job because she went against her employer's vaccination policy.

[13] I find that it is undisputed that the Appellant lost her job because she went against her employer's vaccination policy.

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

[14] The reason for the Appellant's suspension is misconduct under the law.

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

² See sections 30 and 31 of the Act.

[16] Case law says that, to be misconduct, 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 law.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 let go because of that.⁶

[18] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.⁸

[19] I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.⁹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[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.¹⁰

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

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

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

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

⁷ See section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[21] The Commission says that there was misconduct because:

- the employer had a vaccination policy
- the Appellant was aware of the employer's policy
- the Appellant was given ample time to comply with the policy
- the Appellant's request for a religious exemption was denied by the employer

[22] The Appellant says that there was no misconduct because:

- the employer should have allowed her an exemption to the policy, based on religious, conscientious, and medical grounds
- the policy is against several laws and legal principles, including the *Canadian Bill of Rights*, the *Canadian Charter of Rights and Freedoms*, the *Criminal Code of Canada*, human rights laws, privacy laws, and health laws
- the vaccine doesn't prevent transmission
- there are adverse reactions to taking the vaccine

[23] The employer's vaccination policy says that employees must be fully vaccinated against COVID-19 by November 1, 2021. Employees who don't follow the policy may be suspended or face other discipline.¹¹ The deadline was extended to November 15, 2021.¹²

[24] The Appellant testified that she didn't take the vaccine.

[25] The Appellant says that she has allergies, including that she is allergic to Penicillin. She says that she was unable to get a doctor's note in support of a medical exemption of the policy.

¹¹ See GD3-55 to 57 and GD3-83 to 88.

¹² See GD3-19 to 20 and GD3-89.

[26] The Appellant says that she requested a religious exemption of the policy from her employer on October 26, 2021. She says that she included a letter of support from a religious leader. The employer denied her request, by letter dated November 1, 2021.¹³

[27] The Appellant says that she wrote to her employer several times, after her request for an exemption was denied, asking the employer to reassess her request. She says that her employer didn't respond.

[28] The Appellant says that she was suspended from her job on November 15, 2021. On this date, she says that she was called into a meeting with the employer and her union leader. She says that she was told she is suspended as she didn't follow the policy.

[29] The employer gave the Appellant the following correspondence:

- A letter dated November 15, 2021, stating that she didn't follow the policy. It states that the employer requires employee to be fully vaccinated by November 15, 2021. It states that she is suspended effective November 15, 2021, until February 1, 2022. It states that if she follows the policy, she can contact the employer regarding her return to work.¹⁴
- A letter dated January 19, 2022, stating that she didn't follow the policy. It states that her suspension will be extended until March 31, 2022.¹⁵
- A letter dated March 19, 2022, stating that the policy has been changed and the Appellant is able to return to work effective April 4, 2022.¹⁶

[30] The Appellant says that she returned to work on April 4, 2022.

¹³ See GD3-25.

¹⁴ See GD3-31.

¹⁵ See GD3-33.

¹⁶ See GD6-21 to 22.

[31] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that said employees must be vaccinated against COVID-19
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated
- the employer sent several letters and spoke to the Appellant to communicate what it expected
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

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

[32] Based on my findings above, I find that the Appellant lost her job because of misconduct.

[33] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job.

Conclusion

[34] The Commission has proven that the Appellant lost her job because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits.

[35] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section