



Citation: *IL v Canada Employment Insurance Commission*, 2023 SST 636

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: I. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (507708) dated August 9, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Teleconference

Hearing date: February 7, 2023

Hearing participant: Appellant

Decision date: February 17, 2023

File number: GE-22-3068

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 disqualified 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 dismissal. It decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[6] The Appellant says her employer didn't have a vaccine policy. She says that she didn't want to risk her health by taking the vaccine. She says that she wasn't offered any accommodation by her employer. She says that she wasn't offered any alternatives by her employer.

Issue

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

¹ Section 30 of the *Employment Insurance Act* (Act) says that appellant's who lose their job because of misconduct are disqualified 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 says that the employer didn't have a vaccination policy. She says she lost her job because she went against the order of the Provincial Health Officer (PHO), which her employer required her to follow.

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

[13] I find that that the Appellant lost her job because she went against her employer's vaccination policy. I find that the employer's policy is to follow the order of the PHO.

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

[14] The reason for the Appellant's dismissal 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 dismissal is misconduct under the Act. It sets out the legal test for

² See sections 30 and 31 of the Act.

misconduct—the questions and criteria to consider when examining the issue of misconduct.

[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

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.

means that it has to show that it is more likely than not that the Appellant lost her job because of misconduct.¹⁰

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

- the employer had a vaccination policy
- the employer clearly communicated the policy to the Appellant
- the Appellant was aware that not following the policy would cause her to lose her job
- the policy is reasonable within the workplace context, which was a healthcare operation during a pandemic

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

- the employer didn't have a vaccination policy, instead it followed the order of the Provincial Health Officer (PHO)
- she didn't want to risk her health by taking the vaccine, due to her autoimmune condition
- she wasn't offered any accommodation by her employer, and her request for a medical exemption was denied by the PHO
- she wasn't offered any alternatives by her employer, including masking or testing

[23] The Appellant testified that she didn't get vaccinated against COVID-19. She says that she has an autoimmune condition, and she didn't want to risk her health. She says that vaccine trials did minimal testing on those with autoimmune conditions.

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

[24] The Appellant testified that the employer, X, told her she needed to be vaccinated against COVID-19 in October 2021. She says that she was aware that she would be put on an unpaid leave, and could be dismissed, if she didn't get the vaccine.

[25] The Appellant says that she asked her employer for a specific vaccination policy, as drafted by her employer. She says that she was told that the employer is following the order of the PHO. She says that if X had its own specific policy, it should have been provided to her.¹¹

[26] The Appellant says that she has only received an Influenza Control Program policy, as drafted by her employer. This policy says that employees must be vaccinated against influenza or wear a mask during influenza season when in a patient care area.¹²

[27] The Appellant says that she applied for an exemption by providing a letter from her doctor that outlines her medical conditions.¹³ She says that her request for an exemption was denied by the PHO. She says that the PHO required her doctor to complete a specific form, and her doctor refused to complete this form.

[28] In her application for EI benefits, the Appellant says that she had online meetings with her employer on December 1, 2021, and January 24, 2022.¹⁴ At the hearing, she testified that they discussed whether she was vaccinated, the employer's requirement to get vaccinated, and that she will be dismissed if she doesn't get vaccinated.

[29] In her application for EI benefits, the Appellant says that she was put on an unpaid leave on October 26, 2021, and she was dismissed on January 24, 2022.¹⁵

[30] The employer told the Commission that the Appellant didn't follow its vaccination policy. The employer told it that she was placed on an unpaid leave on October 26,

¹¹ See GD6-5 and 6.

¹² See GD2-2 to 4.

¹³ See GD2-5.

¹⁴ See GD3-11.

¹⁵ See GD3-9.

2021, and she was dismissed on January 24, 2022. The employer says that the policy can be found on the British Columbia government website.¹⁶

[31] The appeal file contained the COVID-19 vaccination policy for BC Public Service employees. It says it is updated June 27, 2022. It says:

- all employees must provide proof of full vaccination against COVID-19, effective November 8, 2021
- employees who don't provide proof of vaccination or refuse to disclose their vaccination status by November 22, 2021, will be considered unvaccinated
- employees may request an exemption to the policy based on a medical condition or protected human rights ground
- unvaccinated employees will be placed on a leave without pay for three months
- after three months of being placed on a leave without pay, employees who have not become at least partially vaccinated may be terminated¹⁷

[32] The Appellant says that she filed a grievance against her employer. She says that she thinks that her grievance states that the employer should have developed its own policy, and not relied solely upon the order of the PHO.

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

- the employer had a vaccination policy that says that employees must be vaccinated against COVID-19

¹⁶ See GD3-33.

¹⁷ See GD3-34 to 45.

- it is not for me to decide whether the employer must draft its own policy, outside of it following an order of the PHO¹⁸
- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated
- the employer spoke to the Appellant several times to communicate what it expected
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy
- I rely on the Appellant's testimony, her application for EI benefits, and the employer's call with the Commission in making my decision, as the policy provided in the file is dated after the Appellant was dismissed

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

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

[35] 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

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

[37] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section

¹⁸ See *Anthony Cecchetto v Attorney General of Canada*, 2023 FC 102 which discusses the limited scope of this Tribunal's legal mandate.