



[TRANSLATION]

Citation: *HG v Canada Employment Insurance Commission*, 2023 SST 942

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

Decision

Appellant: H. G.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (538085) dated October 5, 2022 (issued by Service Canada)

Tribunal member: Josée Langlois
Type of hearing: Videoconference
Hearing date: March 21, 2023
Hearing participant: Appellant
Decision date: March 22, 2023
File number : GE-22-3663

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 Canada. On December 10, 2021, she stopped working 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 decided that the Appellant was suspended because of misconduct. It could not pay her EI benefits.

[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 this mandate wasn't included in her employment contract and that she was teleworking at the time.

[6] I have to determine 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 EI benefits until the end of the suspension period.

Analysis

[9] To answer the question of whether the Appellant temporarily stopped working because of misconduct, I have to decide two things. First, I have to determine why the Claimant temporarily lost her job. Then, I have to determine 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. Under the policy, she had to provide the employer with proof of COVID-19 vaccination by December 10, 2021, and she refused to do so.

[11] The Record of Employment that the employer sent to the Commission shows that the Appellant was on unpaid leave due to non-compliance with the vaccination policy. The employer asked the Commission to consider that the Appellant had been suspended or let go.

[12] At the hearing, the Appellant admitted that she was suspended from her duties for not complying with the employer's vaccination policy.

[13] The Appellant and the Commission agree on why the Appellant temporarily stopped working.

[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] A worker who is suspended because of misconduct isn't entitled to receive EI benefits until the end of the suspension period.²

[16] The reason for the Appellant's suspension is misconduct under the Act. A worker who is let go because of misconduct can't receive EI benefits.

[17] To be 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

[18] 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

[19] The Commission has to prove that the Appellant stopped working 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 was suspended because of misconduct.⁷

[20] The employer adopted a mandatory COVID-19 vaccination policy.⁸ Under the policy, employees had to provide a COVID-19 vaccination attestation by December 10, 2021.

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 of Canada 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 the Core Public Administration Including the Royal Canadian Mounted Police* at GD3-29 *et seq.*

[21] The policy said that employees who didn't provide a vaccination attestation by December 10, 2021, would be placed on unpaid leave.

[22] On December 10, 2021, the Appellant still hadn't provided a vaccination attestation, and she was suspended.

[23] The Appellant admits that she was told about the employer's vaccination policy and the consequences of not complying. She says that all employees received many emails about this and that there were meetings too.

[24] But, she says that this vaccine mandate isn't included in her employment contract and that her decision not to get vaccinated and/or provide the employer with a COVID-19 vaccination attestation is a personal and confidential choice.

[25] The Appellant argues that her situation was low-risk for spreading the virus because she was teleworking, that she didn't commit any misconduct, and that she was good at her job.

[26] Lastly, the Appellant says that she didn't sit and do nothing and that she looked for another job while she was suspended. She worked 75 hours at X, 192 hours at X, and 330 hours at X.⁹ She says that she should be able to get benefits.

[27] The Commission argues that the Appellant was told about the employer's vaccination policy and that she was given time to provide a vaccination attestation. It also says that she knew there would be consequences if she didn't comply with the policy. On this point, it says that the employer's policy clearly explains the consequences of not complying and that the Appellant could assume she would be suspended if she didn't comply.

[28] In addition, the Commission says that a ministerial order was issued and that the employer can adopt a COVID-19 vaccination policy for all federal employees, regardless of where they work, to reduce the risk of spreading the virus. On this point, it

⁹ The Records of Employment are at GD3-39 to GD3-43.

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] Lastly, 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 provided alternatives.

[30] I agree with the Commission. The question of whether the employer's policy is reasonable or whether the employer should provide additional accommodation to an employee who, for example, is teleworking, must be decided in another forum.¹⁰ The Federal Court of Appeal has said that the Tribunal has to focus on the claimant's conduct, not the employer's. On this point, there will be misconduct where a **claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility.**¹¹

[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 her explanations, when a claimant deliberately violates an employer 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] While I understand that the policy wasn't in effect when the Appellant was hired, it was a new directive that was adopted given the circumstances of the COVID-19 pandemic. Employees could get certain exemptions from the employer, such as a medical exemption. As the Appellant said, she had no reason to ask for a medical or

¹⁰ *Paradis v Attorney General of Canada*, 2016 FC 1282.

¹¹ *Nelson v Attorney General of Canada*, 2019 FCA 222 (CanLII).

religious exemption, and she didn't do so. But, she didn't want to disclose her vaccination status to her employer.

[34] 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, for the purposes of misconduct, it isn't relevant to consider whether the employer should have proposed other measures. In this case, the issue is whether the alleged misconduct was the reason for the suspension.¹² This is the case. And, I am not authorized to determine whether **the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal** (or suspension, in this case).¹³ But, I am making this decision on a balance of probabilities, and in doing so, I am considering all the relevant facts.

[35] 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 she knew there would be consequences if she refused.

[36] For a finding of misconduct, the action needs to be wilful, deliberate, or intentional. Even though the Appellant didn't intend the consequences, that is, being suspended, she wilfully chose not to provide her vaccination status to the employer. She had been told about the policy and the consequences of not complying.

[37] As I 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 aren't intended.**¹⁴

[38] So, the employer suspended the Appellant for not following its rules; she refused to comply with the vaccination policy, which was mandatory for all employees (unless

¹² *Mishibinijima v Attorney General of Canada*, 2007 FCA 36 (CanLII).

¹³ *Attorney General of Canada v Marion*, 2002 FCA 185 (CanLII).

¹⁴ *Attorney General of Canada v Tucker*, A-381-85.

they provided a medical or religious exemption). The Appellant's refusal to provide an attestation of her vaccination status was a breach of the employer's rules and of her job duties.

[39] The Appellant admits getting 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.

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

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

[41] Based on my findings above, I find that the Appellant did what the employer says she did and that her refusal to comply with the employer's mandatory vaccination policy amounts to misconduct under the Act.

Conclusion

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

[43] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section