



Citation: *MS v Canada Employment Insurance Commission*, 2022 SST 1776

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

Decision

Appellant: M. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (480440) dated June 24, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: December 21, 2022

Hearing participant: Appellant

Decision date: December 30, 2022

File number: GE-22-2456

Decision

[1] M. S. is the Claimant. The Canada Employment Insurance Commission (Commission) says she can't get Employment Insurance (EI) benefits. The Claimant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Claimant's appeal. I find that she stopped working because of a suspension. And I find that her employer suspended her because of misconduct, under the meaning of the *Employment Insurance Act* (EI Act). This means she can't get EI benefits while she was off work.

Overview

[3] The Claimant's employer introduced a COVID-19 policy, which it called a "practice." Under the employer's policy, all employees had to show proof of vaccination against COVID-19 by a deadline. The Claimant didn't show her employer proof of vaccination and so her employer put her on an unpaid leave of absence.

[4] The Commission says this means the Claimant's employer suspended her. And the Commission says the Claimant stopped working because of misconduct. The Commission says she knew about the policy and she should have known that she might lose her job if she didn't follow the policy. The Commission says she acted deliberately when she decided not to follow the policy.

[5] The Claimant disagrees. She says her employer didn't suspend her because they forced her to take an unpaid leave of absence. She says her employer violated the terms of her collective agreement. She says the employer can't force her to take a vaccine. She says the employer should have given her alternatives to vaccination. She doesn't think the COVID-19 vaccine is safe.

Issue

[6] Did the Claimant lose her job because of misconduct?

Analysis

[7] To make a decision in this appeal, I have to look at a few questions. First, I have to decide why the Claimant stopped working. Did she voluntarily take a leave of absence or did her employer suspend her? If I decide that her employer suspended her, then I have to decide what caused her suspension. And then I have to decide if the reason for her suspension is misconduct under the meaning of the EI Act.

Did the Claimant voluntarily take leave from her job or did her employer suspend her?

[8] Both the Claimant and the Commission have made different arguments about why the Claimant stopped working. But I find that the Claimant stopped working because her employer suspended her.

[9] The Commission originally decided that the Claimant voluntarily took leave from her job. But after reconsidering its decision, the Commission decided that the Claimant's employer suspended her. In its arguments to the Tribunal, the Commission says that the Claimant's employer suspended her.

[10] The Claimant told the Commission that she didn't choose to leave her job. She also wrote a letter to her employer. In her letter, she said she didn't choose to leave her job. In her appeal to the Tribunal, she said her employer imposed the leave on her without her agreement. But at the hearing, the Claimant made arguments about why she thought she had just cause for leaving her job.

[11] This means I have to decide if the Claimant stopped working because she voluntarily took leave or if her employer suspended her. Case law says I can look at these two issues together.¹ This is because they both have the same effect on entitlement to EI benefits.

¹ The Federal Court of Appeal explains this principle in *Canada (Attorney General) v Desson*, 2004 FCA 303, at para. 4.

[12] I give a lot of weight to the letter the Claimant wrote to her employer. She wrote this letter on the same day she stopped working. So, I think this letter gives me a good picture of why the Claimant stopped working.

[13] In her letter to her employer, the Claimant said that she wanted to work, but the employer wouldn't let her. She said she didn't choose to go on leave and the employer forced her to go on leave.

[14] I also give weight to the letter the employer gave to the Claimant. The letter says the employer is putting her on an unpaid leave of absence. There isn't anything in the employer's letter that says this is the Claimant's choice.

[15] I don't think the evidence in this appeal file shows that the Claimant chose to leave her job. She didn't choose to go on a leave of absence. She didn't voluntarily take leave from her job.

[16] Instead, I find that her employer made the decision to temporarily end her employment. I think this means that her employer suspended her.

[17] So now I must decide what the Claimant did to cause her suspension. And I have to decide if those actions are misconduct under the law.

Why did the Claimant's employer suspend her?

[18] The Commission says the Claimant's employer suspended her because she didn't follow their COVID-19 policy. She didn't give her employer proof of vaccination by the deadline.

[19] The Claimant told the Commission that her employer forced her on leave because she didn't follow their COVID-19 vaccination policy. She agreed that she didn't give her employer proof of vaccination against COVID-19. She said the same thing on her notice of appeal to the Tribunal.

[20] And the employer's letter to the Claimant says that they are putting her on an unpaid leave of absence because she hadn't complied with their COVID-19 vaccination policy.

[21] I find that the evidence in this appeal file shows me that the Claimant's employer suspended her because she didn't follow its COVID-19 vaccination policy. Nothing in the appeal file makes me think she stopped working for any other reason.

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

[22] 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 Claimant 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.⁴

[23] There is misconduct if the Claimant 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

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

[25] The Commission says the Claimant lost her job because of misconduct. The Commission says she knew about her employer's COVID-19 vaccination policy. The Commission says she knew she could lose her job if she didn't follow the policy. But she acted deliberately when she refused to follow the employer's policy.

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

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

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.

[26] The Claimant disagrees. She says her employer acted unlawfully when it introduced a COVID-19 vaccination policy. She says her employer violated the terms of her collective agreement. She says her employer should have given her alternatives to vaccination. She says she has the right to make her own decisions about her health. She doesn't think the COVID-19 vaccine is safe or effective.

[27] I agree with the Commission. I find that the reasons the Claimant stopped working are misconduct under the meaning of the EI Act.

[28] At the hearing, the Claimant said that her employer wasn't clear about the consequences if she didn't follow the COVID-19 vaccination policy. She said there were rumours that she could lose her job, but her employer never clearly told her about the consequences.

[29] But the employer's letter to the Claimant says that they notified the Claimant of the policy. The letter says that they notified employees of the consequences of failing to follow the policy by communicating with employees and sending letters to employees' homes.

[30] At the hearing, I asked the Claimant if she got her employer's letters. She agreed that her employer sent her letters, but she said she decided not to read the letters.

[31] So, I don't agree with the Claimant when she says that her employer wasn't clear about the consequences if she didn't follow the policy. I think it is likely that the employer notified the Claimant that she could lose her job if she didn't follow the policy. I think the Claimant acted recklessly and like she didn't care about her job when she decided not to read her employer's letters about the policy.

[32] I find that the Claimant reasonably should have known that there was a very real possibility that she could lose her job if she didn't follow the COVID-19 policy.

[33] Many of the Claimant's arguments are about her employer's actions. But I am not looking at the employer's actions. I can't make any decisions about whether the employer's policy was reasonable or justified. I can't make decisions about whether the

employer should have given the Claimant other options or exempted her from the policy. I am not making decisions about whether the employer violated the terms of the Claimant's collective agreement when it introduced its COVID-19 policy.⁷

[34] I can only look at the Claimant's actions and decide if she lost her job because of misconduct, under the meaning of the law. And I find that her actions are misconduct, for these reasons:

- She knew that her employer had a COVID-19 vaccination policy. She knew that her employer expected all employees to show proof of vaccination against COVID-19 by a deadline.
- She reasonably should have known that she could lose her job if she didn't follow the employer's policy. Even if she says that she didn't know that there was a risk of losing her job, I think she acted recklessly when she decided not to read her employer's letters to her home.
- The Claimant acted deliberately when she decided not to follow her employer's COVID-19 vaccination policy. She didn't give her employer proof of vaccination by the deadline.
- The Claimant's failure to follow her employer's COVID-19 vaccination policy led directly to her suspension.

[35] So, I find that the reason the Claimant lost her job meets all the parts of the legal test for misconduct. The reason her employer suspended her is misconduct under the meaning of the EI Act.

⁷ See *Canada (Attorney General) v McNamara*, 2007 FCA 107, especially paragraphs 22 and 23. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282, paragraphs 31 and 34.

Conclusion

[36] I am dismissing the Claimant's appeal. I find that she stopped working because her employer suspended her. And I find that the reason for her suspension is misconduct under the law. This means she can't get EI benefits during her suspension.

Amanda Pezzutto

Member, General Division – Employment Insurance Section