



Citation: *DC v Canada Employment Insurance Commission*, 2023 SST 852

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: D. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (540806) dated November 4, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: April 19, 2023

Hearing participant: Appellant

Decision date: April 28, 2023

File number: GE-22-3920

Decision

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

[2] I am dismissing the Appellant's appeal. I agree with the Commission. I find that the Appellant's employer suspended her, and the reason for her suspension is misconduct under the meaning of the law. This means she can't get EI benefits during her suspension.¹

Overview

[3] The Appellant's employer introduced a COVID-19 vaccination policy. Under the policy, the employer expected all employees to attest to their vaccination status. Employees had to show proof of vaccination against COVID-19 or the employer would put them on an unpaid leave of absence. The Appellant didn't attest to her vaccination status and she didn't give her employer proof of vaccination against COVID-19. So, the employer put the Appellant on an unpaid leave of absence.

[4] The Commission says this means that the Appellant's employer suspended her. The Commission says the reason for her suspension is misconduct under the law. This is because the Commission says the Appellant knew about her employer's policy and knew she couldn't keep working if she didn't follow the policy. The Commission says she acted deliberately when she didn't follow the employer's policy.

[5] The Appellant disagrees. She says she has the right to refuse the COVID-19 vaccine. She says her employer's policy was illegal and unfair. She said that the vaccination policy it wasn't part of her collective agreement or employment contract when she started her job.

¹ Section 31 of the *Employment Insurance Act* says you aren't entitled to EI benefits if you are suspended for misconduct.

Issue

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

Analysis

[7] 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 stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose her job?

[8] The Commission says I should treat the Appellant's loss of employment as a suspension. And the Commission says her employer suspended her because she didn't follow the employer's COVID-19 vaccination policy.

[9] The Appellant says she didn't choose to leave her job. She says her employer put her on an unpaid leave of absence. And she agrees that her employer put her on an unpaid leave of absence because she didn't follow the COVID-19 vaccination policy.

[10] I agree with the Commission. I will treat the Appellant's loss of employment as a suspension.

[11] The Appellant has always said she didn't choose to leave. She says she wanted to keep working. So, it is clear to me that the Appellant didn't stop working because she chose to take a leave of absence.

[12] And there isn't any evidence in the appeal file that makes me think the Appellant stopped working because of a shortage of work.

[13] The Appellant and the Commission agree that the employer chose to put the Appellant on an unpaid leave of absence. I think this means that the employer suspended the Appellant.

[14] Both the Appellant and the Commission agree that the reason the employer put the Appellant on an unpaid leave of absence is because of the COVID-19 vaccination policy. The employer expected the Appellant to attest to her vaccination status and show proof of vaccination by a deadline. The Appellant didn't do this, and so the employer put her on an unpaid leave of absence.

[15] So, I find that the Appellant stopped working because of a suspension. Her employer suspended her because she didn't follow the employer's COVID-19 vaccination policy by the deadline.

[16] At the hearing, the Appellant said her employer said she could return to work on July 6, 2022. But she said she didn't return to work for medical reasons. She still hasn't returned to work.

[17] The Commission has only made a reconsideration decision about whether the Appellant's employer suspended her for misconduct. The Commission hasn't made any reconsideration decisions about whether the Appellant should be entitled to EI benefits after July 6, 2022.

[18] I can only hear an appeal after the Commission has first reconsidered a decision.² Since the Commission hasn't made any reconsideration decisions about the Appellant's entitlement to EI benefits after her employer invited to return to work, I find that I don't have the authority to make a decision on this issue. I will only look at the Appellant's entitlement to EI benefits from December 26, 2021 (the start of her benefit period) until July 5, 2022.

[19] Now I must decide if the Appellant's actions – failing to follow her employer's COVID-19 vaccination policy – are misconduct under the law.

² Section 113 of the *Employment Insurance Act*.

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

– What is the definition of misconduct under the *Employment Insurance Act* (EI Act)?

[20] To be misconduct under the law, 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

[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 suspended because of that.⁶

[22] 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 stopped working because of misconduct.⁷

– Is the reason for the Appellant's suspension misconduct?

[23] The Commission says the Appellant's employer suspended her because of misconduct. This is because the Commission says the Appellant knew about her employer's COVID-19 vaccination policy. She knew the employer would suspend her if she didn't follow the policy. But the Commission says the Appellant acted deliberately when she didn't follow her employer's policy.

[24] The Appellant disagrees. She says she has the right to refuse the COVID-19 vaccine. She says her employer's policy was unfair and illegal. She says there wasn't a

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

vaccination requirement when she signed her employment contract and there isn't a vaccination policy in her collective agreement.

[25] I agree with the Commission. I find that the Appellant stopped working because of misconduct.

[26] The Appellant and the Commission agree about many of the basic facts in this appeal.

[27] The Appellant's employer introduced a COVID-19 vaccination policy. Under the policy, the employer expected all employees to attest to their vaccination status. Employees who weren't vaccinated against COVID-19 couldn't continue working. The employer said it would put employees on an unpaid leave of absence if they didn't follow the policy.

[28] The Appellant didn't attest to her vaccination status and didn't show proof of vaccination by the employer's deadline. This was the reason her employer put her on an unpaid leave of absence.

[29] I can accept the above facts, because the Appellant and the Commission agree on these basic facts.

[30] I understand that the Appellant says that she didn't think her employer would really follow through with the consequences in the policy. At the hearing, she said she didn't think her employer would really put her on an unpaid leave of absence.

[31] But I think the Appellant reasonably should have known that a suspension was a very real possibility. This is because she agrees that the employer's policy said that it would put employees on an unpaid leave of absence if they didn't follow the policy.

[32] So, I find that the reason for the Appellant's suspension is misconduct. This is because:

- The Appellant knew about her employer's COVID-19 vaccination policy.

- She knew the employer expected her to attest to her vaccination status and show proof of vaccination by the deadline.
- She reasonably should have known that the employer was likely to suspend her if she didn't follow the policy. This is because the policy said that the employer would suspend employees who didn't follow the policy.
- She acted deliberately when she didn't attest to her vaccination status and didn't show her employer proof of vaccination by the deadline.
- Her actions – failing to follow the employer's COVID-19 vaccination policy – led directly to her suspension.

[33] Many of the Appellant's arguments are about her employer's actions. She says she disagrees with the employer's vaccination policy. She doesn't think her employer has the power to introduce a vaccination policy. She thinks the vaccination policy violates the terms of her collective agreement.

[34] But I'm not looking at the employer's actions. I can only consider the Appellant's own actions and decide if the reason she stopped working is misconduct under the law.

[35] This means I can't decide if the employer acted fairly by introducing a vaccination policy.⁸ I am not making any decisions about the safety or efficacy of the COVID-19 vaccine. I can't make decisions about whether the employer violated the terms of the Appellant's collective agreement. The Appellant can pursue other measures through a human rights tribunal or her union if she wants to make these arguments.

[36] And I find that the reasons for the Appellant's suspension are misconduct, under the meaning of the law.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34. Also see *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

Conclusion

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

Amanda Pezzutto

Member, General Division – Employment Insurance Section