



Citation: *CD v Canada Employment Insurance Commission*, 2023 SST 888

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

Decision

Appellant: C. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (548784) dated October 31, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Teleconference

Hearing date: April 5, 2023

Hearing participant: Appellant

Decision date: April 28, 2023

File number: GE-22-3908

Decision

[1] C. D. 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 find that her employer suspended and then dismissed her because of misconduct, under the meaning of the *Employment Insurance Act* (EI Act). This means she can't get EI benefits.

Overview

[3] The Appellant worked in health care. Following a provincial health order, her employer introduced a COVID-19 vaccination policy. Under its policy, the employer expected all employees to show proof of vaccination against COVID-19. The Appellant didn't show her employer proof of vaccination by the deadline. So, her employer suspended her. After a few more weeks, her employer dismissed her.

[4] The Commission says the reasons for the Appellant's suspension and dismissal are misconduct under the meaning of the law. The Commission says this is because she knew about her employer's COVID-19 policy. She knew she couldn't continue working if she didn't follow the policy. The Commission says she acted deliberately when she didn't follow her employer's policy.

[5] The Appellant disagrees. She says her employer didn't have the authority to introduce a COVID-19 vaccination requirement. She says the employer didn't follow a progressive disciplinary policy and acted too harshly by dismissing her. She says the employer didn't follow the terms of her collective agreement. She says she had religious and medical reasons for refusing the COVID-19 vaccination.

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 lost her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant stop working?

[8] The Commission says the Appellant stopped working because of a suspension and then a dismissal. The Commission says the reason for both the suspension and dismissal is because she didn't follow the employer's COVID-19 vaccination policy.

[9] The Appellant says she didn't choose to stop working. She agrees that her employer put her on an unpaid leave of absence and then dismissed her. She agrees that this happened because of the employer's expectations about COVID-19 vaccination. But she disagrees that the COVID-19 vaccination requirement was a real policy.

[10] I agree with the Commission. I will treat the Appellant's loss of employment as a suspension and dismissal. I think the reason she stopped working is because she didn't follow her employer's COVID-19 vaccination policy. And in this decision, I will call the employer's COVID-19 vaccine requirement a policy.

[11] I understand that the Appellant argues that the employer's vaccination requirement wasn't a real policy. She says the employer didn't follow the collective agreement when it introduced the vaccination requirement. But the evidence in the appeal file shows me that the employer was following a public health order when it required its employees to show proof of vaccination against COVID-19. The employer notified employees of this expectation in writing, several times. The employer set a deadline for complying. The employer outlined the consequences for employees who didn't show proof of vaccination by the deadline.

[12] So, I think this means that the employer's COVID-19 vaccination requirement had the same effect as a policy. It applied to all employees, the employer notified employees of its expectations and the deadline, and failing to follow the employer's expectations had consequences for employees. So, in this decision, I will refer to the employer's expectations as a COVID-19 vaccination policy.

[13] I also think the evidence shows me that the Appellant first stopped working because of a suspension. This is because no one says the Appellant chose to leave her job. She didn't stop working because of a shortage of work. Instead, the employer chose to put her 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 employer eventually dismissed the Appellant. So, I accept that the Appellant's employer dismissed her on November 17, 2021.

[15] There are letters from the Appellant's employer in the appeal file. These letters say the reason for the Appellant's suspension and dismissal are because she didn't follow the employer's COVID-19 vaccination policy. The Appellant hasn't given me any reason to doubt these letters, and she hasn't said there was any other reason for her suspension or dismissal.

[16] So, I find that the Appellant's employer suspended and then dismissed her. And I find that the Appellant stopped working because she didn't follow her employer's COVID-19 vaccination policy.

[17] Now I must decide if the reason the Appellant stopped working is misconduct under the meaning of the EI Act.

Did the Appellant stop working because of misconduct?

– What is the meaning of misconduct under the EI Act?

[18] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹ Misconduct also includes conduct that is so reckless that it is almost wilful.² 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.³

[19] 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 losing her job because of that.⁴

[20] 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.⁵

– Did the Appellant stop working because of misconduct?

[21] The Commission says the Appellant stopped working because of misconduct. The Commission says she knew about her employer's COVID-19 vaccination policy. She knew the policy said she could lose her job if she didn't show the employer proof of vaccination against COVID-19. And the Commission says she acted deliberately when she didn't follow the employer's policy.

[22] The Appellant disagrees. She says her employer didn't have the right to require her to get vaccinated against COVID-19. She says her employer didn't follow her collective agreement. She says the employer didn't follow a progressive discipline

¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

² See *McKay-Eden v Her Majesty the Queen*, A-402-96.

³ See *Attorney General of Canada v Secours*, A-352-94.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

process and acted too harshly by dismissing her. She says that she had religious and medical reasons to refuse the COVID-19 vaccine.

[23] I agree with the Commission. I find that the Appellant's employer suspended her and then dismissed her because of misconduct under the meaning of the EI Act.

[24] The Appellant worked in health care. Following a public health order, her employer introduced a COVID-19 vaccination requirement. I have already explained why I will call this a policy.

[25] Under the policy, the employer expected all employees to show proof of vaccination against COVID-19 by a deadline of October 26, 2021. The policy said that any employees who didn't show proof of vaccination by the deadline would be put on an unpaid leave of absence. The policy said that it would terminate any employees who still didn't show proof of vaccination after a few weeks of suspension.

[26] There are letters and memos from the Appellant's employer in the appeal file that describe the COVID-19 vaccine policy, the deadline, and the consequences for employees who didn't follow the policy. And the Appellant hasn't given me any reason to doubt the above facts.

[27] So, I find that the Appellant's employer had a COVID-19 vaccine policy. Employees, including the Appellant, had to show proof of vaccination against COVID-19 by October 26, 2021. I find that the policy said that the employer would suspend and then dismiss any employees who didn't follow the policy.

[28] I understand that the Appellant says she didn't think she would lose her job. But I think she reasonably should have known that there was a very real possibility that her employer would suspend and then dismiss her if she didn't follow the policy. This is because the employer's policy clearly says that any employees who didn't follow the policy were at risk of losing their jobs.

[29] I also find that the Appellant acted deliberately when she didn't follow the employer's COVID-19 vaccination policy. This is because I find that she knew about the policy and she made her own choice about COVID-19 vaccination.

[30] So, I find that the reasons for the Appellant's suspension and dismissal are misconduct under the meaning of the law, for the following reasons:

- The Appellant knew about her employer's COVID-19 vaccination policy. She knew the employer expected her to show proof of vaccination against COVID-19 by October 26, 2021.
- She knew the policy said her employer would suspend and then dismiss her if she didn't follow the policy. I think this means she reasonably should have known she could lose her job if she didn't follow the policy.
- She acted deliberately when she chose not to follow the employer's policy and show proof of vaccination by the deadline.
- Her actions – failing to follow the employer's COVID-19 vaccination policy – led directly to her suspension and then dismissal.

[31] The Appellant has made arguments about her employer's actions. She says her employer's COVID-19 vaccination policy was unfair, illegal, and contrary to the terms of her collective agreement. She says her employer didn't follow a progressive disciplinary policy. And she says her employer acted too harshly by terminating her. She also says she had religious and medical reasons to refuse the COVID-19 vaccine.

[32] But case law says that I can't look at the employer's actions when I am making a decision about misconduct. I am not looking at whether the Appellant's employer acted fairly by introducing a COVID-19 vaccination requirement.⁶ I can't make decisions about whether the employer acted too harshly by dismissing the Appellant. I can't make decisions about whether the employer violated the terms of the Appellant's collective

⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34. Also see *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

agreement. And I can't make decisions about whether the employer should have granted her a religious or medical exemption. The Appellant can pursue other measures through a human rights tribunal or her union if she wants to make these arguments.

[33] I also understand that the Appellant thinks I should follow the reasoning of another Tribunal Member in a decision in a similar appeal.⁷

[34] But I am not persuaded by this decision. I won't follow it as I make my decision.

[35] The Tribunal tries to make decisions that are consistent. This means that Tribunal Members should try to follow each others' decisions. But some decisions are outliers. They might interpret the law in a different way. They might use the same case law to reach a novel conclusion. Decisions from the Tribunal aren't binding on other Tribunal Members. But Federal Court and Federal Court of Appeal decisions form part of the law and I have to follow them.

[36] And I have already explained that Federal Court of Appeal and Federal Court decisions consistently say that I can't look at the employer's actions when I am making a decision about misconduct. Again, this means that I can't look at whether the employer should have accommodated the Appellant or given her an exemption from the policy. I can't make a decision about whether the employer's policy was fair or justified. I can only look at the Appellant's own actions and decide if the reasons she lost her job meet the test for misconduct.⁸

[37] And even though other Tribunal decisions aren't part of the law, I must note that there are many General Division and Appeal Division decisions that have looked at similar circumstances. These decisions say that refusing to get vaccinated against COVID-19 can be misconduct. In particular, many Appeal Division decisions agree that there is misconduct when the following conditions are in place:⁹

⁷ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

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

⁹ See, for instance, two recent AD decisions: *SS v Canada Employment Insurance Commission*, 2022 SST 1004 and *MF v Canada Employment Insurance Commission*, 2022 SST 1099

- The employer has a clear policy about COVID-19 vaccination
- The employer notifies the employees of the policy and gives them enough time to follow the policy
- The policy is clear about the consequences of refusing to follow the policy
- As a result, the employee knows, or reasonably ought to know that they will probably lose their job or face suspension if they don't follow the employer's policy
- Even so, the employee makes a deliberate choice not to follow the employer's COVID-19 vaccination policy

[38] I find that all of these conditions are in place in this case. So, I find that the reasons for the Appellant's suspension and dismissal are misconduct under the meaning of the EI Act.

Conclusion

[39] I am dismissing the Appellant's appeal. I find that her employer suspended her and then dismissed her because of misconduct. This means that she can't get EI benefits.

Amanda Pezzutto
Member, General Division – Employment Insurance Section