



Citation: *TP v Canada Employment Insurance Commission*, 2023 SST 1217

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

Decision

Appellant: T. P.

Respondent: Canada Employment Insurance Commission

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

Tribunal member: Gerry McCarthy

Type of hearing: Teleconference

Hearing date: August 10, 2023

Hearing participants: Appellant
Witness (A. H.)

Decision date: August 14, 2023

File number: GE-23-1682

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from her job because of misconduct (in other words, because she did something that caused her to be suspended from her job). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was placed on an unpaid leave of absence from her job on October 31, 2021. The Claimant's employer ("Air Canada") said the Claimant was placed on an unpaid leave of absence because she didn't comply with their Covid-19 vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. It decided that the Claimant was suspended from her job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits starting November 1, 2021.

[5] The Commission says the Claimant was aware of the employer's vaccination deadlines and failed to comply knowing that negative consequences would be the result of such a refusal. The Commission further says the Claimant's leave without pay was considered equivalent to a suspension, because the reason for the leave without pay was non-compliance with the employer's mandatory vaccination policy.

¹ Section 31 of the *Employment Insurance Act* says that a claimant who is suspended from her employment because of her misconduct is not entitled to receive EI benefits until the claimant meets one of the following provisions: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits.

[6] The Claimant says she did comply with the employer's vaccination policy by requesting a religious exemption. However, the Claimant says she was denied a religious exemption after she was placed on an unpaid leave of absence.

Issue

[7] Was the Claimant suspended from her job because of misconduct?

Analysis

[8] To answer the question of whether the Claimant was suspended from her job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from her job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from her job?

[9] I find the Claimant was suspended from her job because she failed to comply with the employer's Covid-19 vaccination policy.

[10] The Commission says the reason the employer gave is the real reason for the suspension. The employer told the Commission that employees were notified by e-mail in August 2021 that they were required to be fully vaccinated by October 31, 2021. The employer further told the Commission that employees were made aware that failing to comply with the policy would result in an unpaid leave of absence starting October 31, 2021 (GD3-39).

[11] The Claimant says she complied with the employer's vaccination policy by requesting a religious exemption. However, the Claimant says she was denied the religious exemption after being placed on a leave of absence.

[12] I find the Claimant was suspended from her job because she failed to comply with the employer's Covid-19 vaccination policy. I realize the Claimant argued she did comply with the employer's vaccination policy because she requested a religious exemption and was denied after being placed on an unpaid leave. Nevertheless, the

reason the Claimant was suspended was that she didn't comply with the employer's vaccination policy by October 31, 2021. I will address the Claimant's argument about when her request for a religious exemption was denied in the following section.

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

[13] The reason for the Claimant's suspension was misconduct under the law.

[14] 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

[15] 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 suspended because of that.⁵

[16] The Commission has to prove that the Claimant was suspended from 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 was suspended from her job because of misconduct.⁶

[17] The Commission says there was misconduct because the Claimant confirmed she was aware of the consequences of her failure to comply with the employer's vaccination policy and chose not to comply. The Commission further says there was a clear causal link between the Claimant's misconduct and her suspension.

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

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[18] The Claimant says there was no misconduct because she complied with the employer's vaccination policy by requesting a religious exemption. She further says she was denied a religious exemption after she was placed on an unpaid leave of absence.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was made aware of the employer's vaccination policy by e-mail on August 25, 2021. Specifically, the Commission showed the Claimant was aware that employees were to be fully vaccinated by October 31, 2021, or placed on an unpaid leave for six-months (GD3-18). Furthermore, the Claimant confirmed during the hearing that in August 2021 employees were advised their vaccination status would need to be provided by September 8, 2021, and were required to be fully vaccinated by October 31, 2021. The Claimant also confirmed during the hearing that she was aware that failing to comply with the employer's vaccination policy would result in an unpaid leave starting October 31, 2021.

[20] I recognize the Claimant argued that she complied with the employer's vaccination policy, because she requested a religious exemption but was denied after being placed on a leave of absence. However, the employer confirmed the Claimant submitted her request for a religious accommodation on October 31, 2021, and the supporting documentation for the request received on October 31, 2021, and **November 12, 2021** (GD3-21). Furthermore, the employer's vaccination policy indicated that all employees must have completed their first dose (in the case of a two-dose vaccine) and have advised of their vaccination status by September 8, 2021, and be fully vaccinated by **October 31, 2021**. In short, I simply cannot conclude the Claimant complied with the employer's vaccination requirement dates as specified in their Covid-19 vaccination policy (GD3-33).

Additional Arguments from the Claimant

[21] I realize the Claimant further argued that she was forced to go on an unpaid leave of absence and referenced the *Digest of Benefit Entitlement Principles* relating to an authorized period of leave. However, on this matter I agree with the Commission that the Claimant wasn't required to take an unpaid leave of absence but instead **chose not**

to comply with the employer's vaccination policy. In other words, the Claimant's decision not to comply with the employer's vaccination policy resulted in her unpaid leave of absence.

[22] I further recognize the Claimant was surprised and disappointed that she was denied a religious exemption by the employer. However, I have no authority to determine if the employer acted fairly or reasonably by implementing a mandatory vaccination policy or denying a religious exemption request. Other avenues existed for the Claimant to raise these arguments.⁷ Furthermore, I must apply the legal test for misconduct to the facts. In short, I cannot change, re-fashion, or ignore the law even in the interest of compassion.⁸

Witness Testimony

[23] I realize the Witness testified that the employer's vaccination policy wasn't in the Claimant's contract when she started working with "Air Canada" in 2015. However, I have no authority or jurisdiction to determine if the employer acted fairly or reasonably by implementing their mandatory vaccination policy in 2021. As mentioned, other avenues existed for the Claimant to raise these arguments.⁹

[24] I further recognize the Witness cited a decision from the Social Security Tribunal General Division (GE-22-3918) to support the Claimant's appeal. Specifically, the Witness explained that this decision indicated there was no wilfulness if an employee participated in complying with an employer's vaccination policy by seeking a religious exemption. Nevertheless, a decision from the General Division of the Social Security Tribunal isn't legally binding on me. Furthermore, a decision from the General Division of the Social Security Tribunal doesn't establish legal precedent.

[25] The Witness further cited a Federal Court decision to support the Claimant's appeal in principle.¹⁰ However, the Federal Court decision cited by the Witness

⁷ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

⁸ *Knee v Canada (Attorney General)*, 2011 FCA 301.

⁹ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

¹⁰ *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

specifically explained that none of the submissions from the appellant in that case provided a basis to overturn the Appeal Division's decision.

[26] Finally, the Witness argued that the Claimant had "followed the steps" in the employer's vaccination policy. I do realize the Claimant submitted a request for a religious exemption on October 31, 2021 (with supporting documentation received on October 31, 2021, and November 12, 2021). However, I cannot conclude the Claimant followed the employer's vaccination policy which required employees to complete their first dose and have advised of their vaccination status by **September 8, 2021**, and to be fully vaccinated by October 31, 2021.

[27] In summary: The Commission proved there was misconduct because the Claimant was aware of the employer's vaccination requirements and made a deliberate and conscious decision not to comply with that policy.

Was the Claimant suspended from her job because of misconduct?

[28] Based on my findings above, I find the Claimant was suspended from her job because of misconduct.

Conclusion

[29] The Commission has proven that the Claimant was suspended from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits from November 1, 2021.

[30] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section