



Citation: *MJ v Canada Employment Insurance Commission*, 2022 SST 1808

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

Decision

Appellant (Claimant): M. J.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (462502) dated April 25, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference and Videoconference
Hearing date: October 5, 2022
Hearing participant: Appellant

Decision date: October 12, 2022
File number: GE-22-1761

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Claimant worked as a registered nurse and was placed on an unpaid leave of absence on October 26, 2021, and dismissed from her job on December 9, 2021. The Claimant's employer ("Interior Health Authority") said the Claimant was placed on an unpaid leave on October 26, 2021, as an employee who had received one dose of vaccine before October 12, 2021, but had not been confirmed to be fully vaccinated after November 15, 2021, as required under the Provincial Health Authority (PHO) Order. The Claimant's employer further said the Claimant was dismissed on December 9, 2021, because she didn't comply with the PHO Order to be fully vaccinated after November 15, 2021.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost her job because of misconduct. Because of this, the Commission decided the Claimant was disqualified from receiving EI benefits as of November 21, 2021.

[5] The Commission says the Claimant's decision not to be fully vaccinated was conscious and intentional and she knew, or ought to have known, that the consequences of refusing to be vaccinated according to policy included being placed on unpaid leave and dismissal.

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

[6] The Claimant says she didn't think she would be dismissed from her job. The Claimant further says her conduct wasn't willful.

Matters I have to consider first

I will accept the documents sent in after the hearing

[7] Before the hearing started, the Claimant explained that she only received the Appeal Record the day before the hearing. The Claimant said she had filed additional documentation to the Tribunal after she read the Appeal Record. I explained to the Claimant that those documents hadn't been placed on the file yet. The Claimant indicated she would refer to her additional documents during the hearing and was willing to proceed and present her case. I explained to the Claimant that I could receive her additional documents as post-hearing documents and they would be in front of me when I made the decision. The Claimant's additional documents were placed on the file on October 6, 2021 (the day after the hearing). I accepted these documents for the Appeal Record and they are now listed as GD14-1 to GD14-26.

[8] The Claimant also sent additional documents post-hearing. Those documents have been accepted and were listed in the Appeal Record as GD15-1 to GD15-9.

[9] Finally, the Claimant's hearing was scheduled as a videoconference. However, when the Claimant connected to the videoconference she confirmed she could see me on the screen, but she couldn't activate her camera so that I could see her on the screen. The Claimant then confirmed she was willing to proceed with a teleconference and videoconference hearing.

Issue

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

Analysis

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

Why did the Claimant lose her job?

[12] I find the Claimant lost her job because she didn't comply with the PHO Order to be fully vaccinated by November 15, 2021.

[13] The Commission says the reason the employer gave is the reason for the dismissal. The employer explained that the Claimant wasn't in compliance with the PHO Order to be fully vaccinated by November 15, 2021 (GD3-56).

[14] The Claimant says the employer didn't have a vaccination policy and she didn't think she would be dismissed.

[15] I find the Claimant lost her job because she didn't comply with the PHO Order to be fully vaccinated by November 15, 2021.

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

[16] The reason for the Claimant's dismissal is misconduct under the law.

[17] 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

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.

[18] 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

[19] 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

[20] The Commission says there was misconduct because the Claimant made a conscious and intentional decision and she knew, or ought to have known, that the consequences of refusing to be fully vaccinated according to policy included being placed on unpaid leave and dismissal.

[21] The Claimant says there was no misconduct because she didn't think she would be dismissed and her conduct lacked willfulness.

[22] I find the Commission has proven there was misconduct, because they showed the Claimant was aware of the PHO Order and the two employer memorandums providing updates on the Covid-19 vaccination requirements. Specifically, the Claimant indicated to the Commission that she was aware of the PHO Order but made the personal decision not to comply with the Order (GD3-53). Furthermore, the Commission provided a copy of the PHO Order that confirmed a second dose of the vaccine must be received before November 15, 2021, in order for an employee to continue working (GD3-76). The Commission also provided a copy of the employer's "Covid-19 Immunization Requirement Policy" which stated that failing to comply with their policy could result in disciplinary action "up to and including termination" (GD3-64).

[23] I realize the Claimant testified that she didn't think she would be dismissed for not receiving the second dose of vaccine. Still, I find the Commission has shown that the

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

Claimant was aware of the PHO Order and the real possibility she could be dismissed by the employer for not being fully vaccinated by November 15, 2021.

Additional Testimony from the Claimant

[24] I realize the Claimant also testified that the memorandums on vaccination requirements issued by the employer were not policy (GD3-57 to GD3-59). Nevertheless, the employer's memorandum from October 15, 2021, states that the PHO Order on **mandatory** vaccination requirements "**for all health-care workers**" was posted on the PHO website. The employer's memorandum further states that "those who are fully vaccinated with two doses of Covid-19 vaccine will be considered in compliance with the order." In short, the vaccination requirements from the PHO Order were legal requirements for health-care employees of "Interior Health Authority."

[25] The Claimant also testified she wasn't aware of the employer's "Covid-19 Immunization Requirement Policy" that was dated December 1, 2021 (GD3-60). Nevertheless, the employer was clear in their memorandum of October 15, 2021, that employees who had not received a first dose of Covid-19 vaccine by November 15, 2021, should anticipate that their employment (and or other contractual arrangements) may be terminated (GD3-58). I realize the Claimant confirmed she had received the first does of vaccine on approximately September 28, 2021. I further recognize the reference to termination in the memorandum of October 15, 2021, was for not having received a first dose of the vaccine by November 15, 2021. Still, the Claimant made a personal decision not to receive the second dose of the vaccine and didn't comply with the PHO Order to be *fully vaccinated* by November 15, 2021. Under the circumstances, the Commission has shown the Claimant knew (or ought to have known) there was a real possibility of being dismissed if she didn't comply with the PHO Order by November 15, 2021.

[26] I further recognize the Claimant argued that the employer's vaccine requirements introduced a new condition of employment and their requirements were "unreasonable."

However, the matter of determining whether the employer's policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for the Claimant to make these arguments.⁷

[27] Finally, the Claimant argued that the PHO Order and the employer's memorandums had conflicting information. Nevertheless, the employer's memorandum of October 15, 2021, clearly stated that those who were fully vaccinated with two doses of Covid-19 vaccine "*will be considered in compliance*" with the PHO Order. On this matter, the Claimant made a personal decision not to comply with the PHO Order by November 15, 2021, and was dismissed by the employer for failing to comply with that PHO Order.

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

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

Conclusion

[29] The Commission has proven the Claimant lost her job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits as of November 21, 2021.

[30] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section

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