



Citation: *AG v Canada Employment Insurance Commission*, 2023 SST 1064

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

Decision

Appellant (Claimant): A. G.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (514119) dated August 24, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference
Hearing date: January 26, 2023
Hearing participants: Appellant
Witness (Mr. B. P.)
Decision date: February 2, 2023
File number: GE-22-3134

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 from November 21, 2021.¹

Overview

[3] The Claimant worked as an “Early Childhood Consultant” and was placed on an unpaid leave of absence by the employer on November 12, 2021 (last day paid). The Claimant’s employer (“X”) said the Claimant was placed on an unpaid leave of absence because she didn’t comply with their 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 from November 21, 2021.

[5] The Commission says the Claimant was aware of the employer’s vaccination policy requirements and voluntarily failed to comply.

[6] The Claimant says the employer’s vaccination policy was vague. She further says there was no vaccine requirement in her collective agreement.

¹ Section 31 of the *Employment Insurance Act* says 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.

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 vaccination policy.

[10] The Commission says the reason the employer gave is the reason the Claimant was suspended. The employer told the Commission the Claimant was placed on an unpaid leave of absence for not complying with their vaccination policy.

[11] The Claimant says her employment was terminated by the employer in July 2022.

[12] I find the Claimant was suspended from her job because she failed to comply with the employer's vaccination policy. I realize the Claimant testified that she was dismissed from her job in July 2022. However, the Commission explained that their initial and reconsideration decisions were based on the information **at the time the Claimant was still employed** but on an unpaid leave of absence (GD4).

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

[13] The reason for the Claimant's suspension is 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 or let go 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 was aware of the employer's vaccination policy requirements and voluntarily failed to comply.

[18] The Claimant says there was no misconduct because the employer's vaccination policy was vague.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was aware of the employer's vaccine requirements (GD3-24). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees who failed to provide proof of vaccination would **be subject to an unpaid leave of absence** (GD3-28). I realize the Claimant argued that the employer's vaccination policy was vague. However, the employer's policy specifically states that failing to provide proof of vaccination would result in being subject to an unpaid leave of absence.

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.

Additional Testimony from the Claimant

[20] I recognize the Claimant testified that the employer's vaccination policy was a new condition of employment imposed without the consent of a union bargaining agent. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. Other avenues existed for Claimant to make these arguments.⁷

[21] In short, the only issue before me is whether the Claimant was suspended from her job because of misconduct. On this matter, I must apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.⁸

Testimony from the Witness

[22] Finally, I realize the Witness testified that the employer contradicted their employment agreement with their vaccine requirement and forced coercion. However, as mentioned the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction.⁹

So, was the Claimant suspended from her job because of misconduct?

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

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.

Conclusion

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

[25] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section