



Citation: *RB v Canada Employment Insurance Commission*, 2023 SST 1250

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: R. B.
Representative: L. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (510923) dated August 16, 2022
(issued by Service Canada)

Tribunal member: Paul Dusome

Type of hearing: Videoconference
Hearing date: January 23, 2023
Hearing participants: Appellant
Appellant's representative

Decision date: January 31, 2023
File number: GE-22-3167

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 isn't disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost her job. The Claimant's employer said that she was let go because she did not comply with the employer's mandatory COVID-19 vaccination policy (Policy).

[4] The Claimant said that there was no misconduct on her part. She was willing to take the Novavax vaccine once it was approved by Health Canada in early 2022. She had been working from home since March 2020 so that vaccination was not needed to protect others. The employer had authorized an extension of her work from home to start on January 17, 2022. That day was the deadline in the Policy for being vaccinated. The employer had discretion under the Policy to do something other than dismiss her. The employer refused to exercise that discretion.

[5] 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 that the Claimant is disqualified from receiving EI benefits.

Matter I have to consider first

I will accept the documents sent in after the hearing

[6] The Claimant was willing to take the Novavax COVID-19 vaccine. She had told the employer she was willing to take Novavax. There is evidence from the employer to

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

confirm this. Approval of this vaccine was pending around the time the employer dismissed the Claimant. In testimony, she was not sure of the exact date of the approval of this vaccine, or when it would be available once approved. She thought it might be available on February 17, 2022. I asked if she could locate documents about the date of the approval of Novavax, and the date of its availability. That evidence could be relevant to the issue of misconduct.

[7] The Claimant provided that evidence to the Tribunal the day after the hearing. She included her new contract of employment with the employer effective December 7, 2022, after her dismissal. The Tribunal forwarded the evidence to the Commission, with a deadline of January 30th for any response. The Commission has not responded by the date of the release of this decision.

Issue

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

Analysis

[9] 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?

[10] I find that the Claimant lost her job because she had not received the COVID-19 vaccination by January 17, 2022. The employer's termination letter stated that she had refused to comply with the Policy.

[11] The Claimant disagrees that she refused to comply with the Policy. The Policy stated that staff who failed or refused to comply will be subject to disciplinary measures at the discretion of management. The Claimant proposed a number of solutions to her not being vaccinated with the mRNA vaccines. She was willing to be vaccinated with

the Novavax vaccine that was being approved by Health Canada shortly after the Policy deadline. The employer rejected all the Claimant's proposals.

[12] I find that the employer dismissed the Claimant for not being fully vaccinated with mRNA vaccines by no later than January 17, 2022, as required by the Policy. Whether that involves misconduct is a different matter.

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

[13] The reason for the Claimant's dismissal isn't 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, he 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 let go because of that.⁵

[16] 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

[17] The Commission says that there was misconduct because the Claimant's behaviour was conscious and intentional. She knew that she would be subject to dismissal if she failed to comply. She refused to comply. Her behaviour was a breach of an express duty under the Policy. Her behaviour caused the dismissal.

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.

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

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

[18] The Claimant says that there was no misconduct because she did nothing wrong, and did not engage in misconduct. She was an exceptional employee, as confirmed by the employer. She did not refuse to be vaccinated against COVID-19. She did refuse the mRNA vaccines, but was willing to take the Novavax vaccine, which was pending approval by Health Canada in the first quarter of 2022. She worked from home and was willing to be tested at her expense if an office attendance was required.

[19] I find that the Commission hasn't proven that there was misconduct, because it has failed to prove two of the four elements that make up misconduct for EI purposes.

– **Findings of fact**

[20] The Claimant had worked for four and one half years as an event coordinator for the governing body of a regulated profession. She had received very positive reviews by management. There had been no discipline or negative assessments. She was well liked and respected by co-workers. These facts were confirmed by a mid-year review in 2020-2021, and a September 26, 2022, letter from her immediate supervisor. This was also confirmed by the fact that on December 7, 2022, the employer hired the Claimant as a contractor in the same role as before. The supervisor's letter also confirmed that the Claimant had told her on several occasions that she was willing to take the Novavax vaccine, and to have COVID-19 testing done.

[21] Beginning on March 16, 2020, the Claimant began working from home due to the COVID-19 pandemic. Between March 15, 2020, and January 20, 2022, the Claimant only attended at the office four or five times. The longest time spent at the office was five days for a project. When at the office, she wore a mask.

[22] On December 13, 2021, the employer offered to extend the work from home arrangement effective January 17, 2022. The arrangement was to work from home Monday to Friday. The arrangement was to be reviewed four months later, and at least once a year after that. The arrangement could be ended by either party on two weeks' notice. The Claimant accepted and returned her signed copy of the letter to the employer on January 5, 2022.

[23] The Claimant received the undated Policy on November 22, 2021, by email with a link to the Policy. She read and understood the Policy. The Policy applied to all staff. The term “fully vaccinated” meant having received more than 14 days in the past, a full course of a COVID-19 vaccine approved for use by Health Canada on an interim or permanent basis. The Policy stated, “All Staff must be Fully Vaccinated by no later than January 17, 2022, as a condition of continued employment or contract.” Staff were also required to show proof of vaccination prior to January 17, 2022. Staff could request an exemption from the requirement to be fully vaccinated by December 17, 2021. The request had to be based on medical inability to be fully vaccinated, or on a sincerely held “religious belief” as defined in human rights law. A decision on an exemption request is final, subject to the discretion of the employer to reconsider. The Policy covered non-compliance. It stated, “Staff who fail or refuse to comply with this Policy will be subject to disciplinary consequences at the discretion of [employer’s name] management, up to and including termination of employment or contract for just cause or material breach.”

[24] The Claimant had discussions with the employer about the Policy over the two months between receiving the Policy and her dismissal. The discussions were with her immediate manager, with the human resources department and with a senior vice-president. She pointed out that working from home did not interfere with carrying out her duties. It had been successful for almost two years. She was not willing to take the mRNA vaccines for medical concerns and for religious reasons. She would take the Novavax vaccine because it was based on proteins rather than mRNA. She was not refusing to be vaccinated. Novavax had not yet been approved by Health Canada for use, but approval was expected in the first quarter of 2022. Pending that approval and being vaccinated, she would take COVID testing at her own expense and use alternative measures if attendance in the office were required. She even put that proposal about Novavax in writing, adding that if she continued working and did not take the vaccine after it was approved, the employer could dismiss her without having to pay any severance. Human resources and the senior vice-president rejected all these proposals. Upper management was inflexible about enforcing the strict terms of the Policy. Upper management failed to use any discretion provided for in the Policy.

[25] Following the hearing, the Claimant provided documents respecting the approval of the Novavax vaccine for use in Canada. Health Canada authorized the use of Novavax's Nuvaxovid COVID-19 vaccine for the prevention of COVID-19 on February 17, 2022. Health Canada announced the beginning of receipt of the vaccine on March 31, 2022. Distribution of the vaccine to the provinces had started. The announcement also stated that the Novavax vaccine "provides an additional vaccine option for those who want a protein-based vaccine or who are unable to receive mRNA vaccines."

[26] The Claimant did not apply for an exemption because the employer told her it was hard to prove the grounds for exemption. Her medical issue was severe asthma. Her concern about how the vaccine could compromise her health led to stress and anxiety. Her doctor could not provide a letter for a medical exemption. Her doctor authorized a two-week medical leave based on the stress and anxiety. The employer's insurer declined to authorize payment for short-term disability. The Claimant took the two-week leave. The employer paid the Claimant sick days for part of the time off. The Claimant's religious ground for opposing the mRNA vaccines was based on her own Christian beliefs, not on church doctrine or direction. Co-workers who had applied for an exemption had been refused. When she learned that the exemptions were refused, she knew that she could be fired.

– **Ruling on misconduct**

[27] For the reasons set out below, I find that the Commission has not proven misconduct on the part of the Claimant. The Commission has failed to prove the elements of wilfulness and breach of a duty owed to the employer. It has proven the elements of awareness of the possible consequences, and the cause of the dismissal. But the Commission must prove all four elements to succeed in the appeal.

[28] The Tribunal does not have to determine whether an employer's policy was reasonable or a claimant's dismissal was justified. The Tribunal has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.⁷

⁷ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[29] Where the alleged misconduct was a direct result of the employer's actions before the misconduct, a review of the employer's conduct prior to the "misconduct" is necessary in order to properly assess whether the employee's conduct was intentional or not. In such a situation, stating that the employer's conduct was irrelevant may be an error.⁸

[30] *Wilfulness* This appeal presents a unique fact situation. The Claimant was willing to take a new vaccine that was pending approval by Health Canada shortly after the deadline for complying with the Policy. She communicated this to upper management of the employer. The employer refused to give her additional time for the new vaccine. She was working mainly from home since 2020. On December 13, 2021, the employer had extended her work from home authorization starting on January 17, 2022. That was also the deadline for compliance with the Policy. The Policy stated that disciplinary consequences for not complying were at the discretion of the employer's management. The employer did not exercise any discretion. It imposed the maximum penalty, termination of employment.

[31] This fact situation falls under the principle noted above. That principle is that where the alleged misconduct was a direct result of the employer's actions before the misconduct, a review of the employer's conduct prior to the "misconduct" is necessary in order to properly assess whether the employee's conduct was intentional or not.

[32] The alleged misconduct in this appeal is the Claimant not being fully vaccinated with a COVID-19 vaccine approved by Health Canada, by the deadline of January 17, 2022. Was that unvaccinated status the direct result of the employer's actions before January 17, 2022? The employer made it clear that it would be very hard for the Claimant to obtain an exemption from the Policy, so she did not apply for an exemption. The employer's letter of December 13, 2021, committed to a work-from-home arrangement starting January 17, 2022, or a later date determined by pandemic protocols, to be reviewed four months after the start date. The Claimant told the

⁸ See *Astolfi v Canada (Attorney General)*, 2020 FC 30.

employer she was willing to be vaccinated with the Novavax when it became available six to eight weeks after the deadline. She said she would be working from home, so presented no health risk to others. If personal attendance were required, she would test at her own expense and practise masking and other measures. The employer said no, then justified the termination based on the very significant health concerns being a material breach of the Policy. The employer had discretion under the Policy. The employer refused to exercise that discretion.

[33] The Claimant had decided not to take an mRNA vaccine, for personal medical and religious reasons. She was not refusing to take all vaccines. She told the employer she was willing to take the Novavax vaccine when available within two months after the deadline. The employer had the discretion under the Policy to take steps other than dismissal, or to grant an extension of time for the Claimant to receive the Novavax vaccine. It refused. That showed the employer putting the set deadline of the Policy, which it had the discretion to modify, ahead of retaining a valued and valuable employee. That refusal was inconsistent with having approved the Claimant for a work-from-home arrangement starting January 17, 2022. The refusal was also inconsistent with its reason for the termination: the very significant health concerns being a material breach of the Policy. Working from home did not present a significant health concern. The Claimant getting the Novavax vaccine when available would eliminate the health concern. It was these actions of the employer that resulted in the alleged misconduct.

[34] I must now assess what bearing the employer's conduct had on whether the Claimant's conduct was intentional or not. It is clear on the evidence that she had decided not to take the mRNA vaccines. It is also clear that she was willing to take the Novavax vaccine when available in six to eight weeks. She told several of the employer's managers and executives of this. She asked the employer to exercise its discretion under the Policy, so that she could be fully vaccinated. She wanted to comply with the Policy but could not meet the deadline. She had a pathway to compliance with a Health Canada approved vaccine within a short period of time. In this context, the employer's inflexible conduct toward the Claimant respecting exemptions and the deadline do not support a conclusion that the Claimant intentionally

refused to comply with the Policy. She was willing to be vaccinated with a vaccine approved by Health Canada. By working from home, she did not pose a health risk to others, so was not violating the principles of the Policy to reduce transmission and adverse health outcomes. She relied on the discretion given to the employer in the Policy. For these reasons, I cannot conclude that the Commission has proven that the Claimant wilfully breached the Policy.

[35] *Breach of a duty owed to the employer* On the face of it, the Claimant was in breach of the Policy by not having been fully vaccinated by the January 17, 2022, deadline. But that ignores the Policy explicitly giving the employer discretion to determine what if any discipline to impose in the case of a breach of the letter of the Policy outside of that discretion. The employer approved a four-month work from home arrangement for the Claimant to start on January 17, 2022, the deadline for vaccination. A reasonable inference from that is that the employer was open to extending the deadline for the Claimant. It was only in January 2022, that the employer made it clear to the Claimant that the deadline was firm for the approved mRNA vaccines, and there was no alternative. The termination letter states that the Claimant made it clear she would not comply with the Policy. That ignores that she was willing to be vaccinated with a pending non-mRNA vaccine. She was not refusing all vaccines. The termination letter relies on the very significant health concerns to justify the termination. The employer's own approval of the Claimant's work from home arrangement starting January 17, 2022, contradicts that justification. The employer was aware when granting that approval that the Claimant did not want to take the mRNA vaccines. From her home, the Claimant would have no contact with co-workers or clients. On the few occasions when attendance at the office might be required, she offered to provide negative tests at her own expense and abide by measures such as masking and distancing to reduce the risk. The employer's justification for termination does not stand up to scrutiny. Add to that the fact that the Claimant was a valued employee, with positive reviews from management, and positive relationships with co-workers and clients. Based on all of the above factors, it was the employer's failure to exercise its discretion under the Policy that led to the termination of the Claimant's employment. So the commission has failed to prove this element of misconduct.

[36] *The Claimant knew or should have known of the possible consequences* The Claimant testified that she initially thought that the employer being happy with her work would weigh against being fired. She recognized in December 2021 when other employees had been refused exemptions, that she could be fired. She still believed that her good standing with the employer and her good record would prevent this outcome. It was only on the last day of work when the vice-president rejected her request to receive Novavax vaccine when available, that she understood that she would be dismissed. At that late date, it was impossible for the Claimant to comply with the Policy. But the Claimant was aware from December that dismissal was a possibility. So the Commission has proven this element of misconduct.

[37] *Cause of the dismissal* On the evidence, there is no other reason shown for the Claimant's dismissal other than not meeting the letter of the Policy (outside the employer's discretion). The Commission has proven this element of misconduct.

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

[38] Based on my findings above, I find that the Claimant didn't lose her job because of misconduct.

Conclusion

[39] The Commission hasn't proven that the Claimant lost her job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[40] This means that the appeal is allowed.

Paul Dusome

Member, General Division – Employment Insurance Section