



Citation: *SM v Canada Employment Insurance Commission*, 2023 SST 1120

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: S. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (544572) dated November 25, 2022 (issued by Service Canada)

Tribunal member: Jillian Evans

Type of hearing: Teleconference

Hearing date: May 23, 2023

Hearing participant: Appellant
Appellant's spouse

Decision date: May 29, 2023

File number: GE-23-123

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

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

Overview

[3] The Appellant S. M. was a dietary aide at a hospital. She was suspended from her job without pay on March 23, 2022 and then dismissed on April 7, 2022.

[4] Her employer implemented a policy in October 2021 that required all employees to receive COVID-19 vaccines.² A deadline for vaccination was initially provided, but the employer extended the date a number of times. Ultimately a final deadline was provided.

[5] When the Appellant did not provide proof of having received the vaccines by that date, her employer dismissed her from her job.

[6] The Commission decided that because S. M. lost her job for knowingly breaching one of her employer's policies, she lost her job due to misconduct. The Commission decided that the Appellant was disqualified from receiving EI benefits.

[7] The Appellant doesn't dispute that she didn't comply with her employer's COVID-19 policy. She agrees that she chose not to get vaccinated and that she knew that this went against her employer's policy.

[8] She also agrees that this was the reason that she lost her job.

[9] The Appellant, however, does not agree that going against her employer's policy is misconduct. She says that she helped her employer during the pandemic and

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

² GD3-33

agreed to work on-site when many other employees would not. She always did her job well and never had any complaints against her.

[10] S. M. also says that the requirement to be vaccinated against COVID-19 was not part of her employment contract when she started at the job, so her refusal to do so cannot be misconduct.

[11] The Appellant says that she has paid into the EI program for her whole working life and that her decision not to undergo experimental medical procedures should not prevent her from receiving the support she deserves when she lost her job through no fault of her own.

[12] My job is to decide if the Appellant's actions and behaviours do in fact meet the legal definition of misconduct under the *Employment Insurance Act*.

Issue

[13] Did S. M. lose her job because of misconduct?

Analysis

[14] The law says that you can't get EI benefits if you lose your job because of misconduct.³

[15] To answer the question of whether S. M. lost her job because of misconduct, I have to decide two things:

- a) First, I have to determine the reason that the Appellant was dismissed.
- b) Then, I have to determine whether the *Employment Insurance Act* considers that reason to be misconduct.

Why did the Appellant lose her job?

[16] I find that S. M. lost her job because she did not comply with her employer's COVID-19 Policy.

³ See sections 29 and 30 of the Act.

[17] As I noted above, the Appellant and the Commission agree that this was the reason for her dismissal. There is no dispute as between them.

[18] On her application for benefits, S. M. indicated that she did not know why she had been dismissed from her job.⁴

[19] However, at the hearing, she testified that she received a letter from her employer some time in February 2023 advising her that she would be terminated if she did not comply with the hospital's vaccination policy. She also confirmed that she had received a number of other letters previously, warning her that she needed to comply with the policy.

[20] S. M. also confirmed at the hearing that when she was suspended without pay on March 23, 2023, she understood that it was because she had still not complied with the hospital's policy requiring her to provide proof of vaccination.

[21] She was ultimately dismissed on April 7, 2022 for this same reason.

[22] This is consistent with the Commission's file where multiple agents noted that S. M. told them that she had lost her job due to non-compliance with her employer's COVID Vaccine policy.⁵ It also echoes the reason that her employer gave the Commission for dismissing her from her job.⁶

[23] I see no evidence to suggest any other reason for her termination. I find, therefore, that the reason the Appellant was dismissed from her job was because she did not receive COVID-19 vaccinations and therefore did not comply with her employer's COVID-19 policy.

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

[24] The Appellant's failure to comply with her employer's COVID-19 vaccination requirements is misconduct under the EI Act.

⁴ GD3-9

⁵ GD3-22, GD3-30,

⁶ GD3-23

[25] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's actions amount to misconduct under the Act. The Act and the case law set out the legal test for misconduct. In some circumstances, for example, the term "misconduct" refers to an employee's violation of an employment rule.

[26] Where the Commission takes the position that a worker seeking benefits has engaged in misconduct, the Commission bears the burden of proof. It has to prove this on a balance of probabilities. In S. M.'s case, this means that the Commission has to show that it is more likely than not that she lost her job because of misconduct.⁷

[27] I have to focus on why S. M. was separated from her employment and whether that reason amounts to misconduct under the EI Act. I can't make my decision based on other laws.

[28] I can't decide, for example, whether a worker was constructively or wrongfully dismissed under employment law: the Federal Court has been clear that the Tribunal does not have the authority to decide whether the employer's policy was fair or whether an employee's dismissal under that policy was justified or reasonable.⁸

[29] Similarly, I am not allowed to interpret an employment contract or decide whether the policy has a good scientific basis.⁹ The Federal Court has said that workers have other legal avenues to grieve or dispute an employer's conduct or to challenge the correctness or legality of what their *employer* did or didn't do.

[30] The Tribunal's jurisdiction is limited to the *Employment Insurance Act*. So, I must focus on the *employee's* behaviour and actions, and whether those behaviours amounted to misconduct.¹⁰

[31] Case law says that to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹¹ The Appellant

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88

⁸ See *Canada (Attorney General) v Marion*, 2002 FCA 185 at paragraph 3

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22

¹⁰ See, for examples of cases that say this, *Canada (Attorney General) v Caul*, 2006 FCA 251 at paragraph 6; *Canada (Attorney General) v Lee*, 2007 FCA 406 at paragraph 5; and *Paradis vs. Canada (Attorney General)*, 2016 FC 1282 at paragraph 31

¹¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

doesn't have to have wrongful intent. The Commission does not have to show that S. M. meant to do something dangerous or wrong for me to decide that her conduct is misconduct.¹²

[32] The case law also says that 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 their employer and that there was a real possibility of being suspended or let go because of that.¹³

The Commission and the Appellant's positions in this case

[33] The Appellant and the Commission agree on a number of facts. Very little evidence about the policy, the timeline and the reason for S. M.'s dismissal is in dispute.

[34] I have reviewed the record (including the Appellant's written statements, the contents of the Commission's file and the evidence S. M. gave at her hearing) and here is what I find the evidence shows:

- a) The Appellant was hired by the employer in May 2020.
- b) The employment contract that she entered into at that time required that she receive a specific list of vaccinations, medical tests and boosters (including measles, tetanus, rubella, tuberculosis and others) before starting work.¹⁴
- c) Her employment contract did not require a COVID-19 vaccination at the time she was hired.
- d) S. M. willingly received all of the listed inoculations at that time.¹⁵

¹² See *Attorney General of Canada v Secours*, A-352-94.

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁴ GD3-37

¹⁵ GD3-37

- e) In September or October 2021 the hospital implemented a new policy requiring that all employees provide proof of having received all required doses of a COVID-19 vaccine.¹⁶
- f) S. M. received a copy of this policy. She did not receive the required series of vaccinations.
- g) S. M. received a number of reminders and warning in writing in November, December and January about the fact that she was breaching the policy.¹⁷
- h) These reminders were left in her mailbox at work and the Appellant confirmed at the hearing that she received them.
- i) S. M. understood that she could be suspended without pay or terminated for failing to follow the policy.
- j) On a date in February 2022 she received a letter in her mailbox at work from her employer that advised her that she would be suspended on March 23, 2022 if she had not received the vaccinations by then.
- k) The Appellant did not receive the vaccinations and was suspended.¹⁸

[35] The Appellant and the Commission agree about these facts.

[36] They disagree about what these facts mean.

[37] The Commission says that these facts show that the Appellant engaged in misconduct: she consciously and knowingly refused to follow her employer's policy about vaccination and she knew that if she did not follow the policy there was a real chance that she would lose her job.

[38] She chose not to comply with the policy anyway.

¹⁶ GD3-34

¹⁷ S. M. testified to this at her hearing.

¹⁸ GD3-20 and GD3-43

[39] The Commission says that this meets the definition of misconduct under the *Employment Insurance Act*.

[40] The Appellant does not dispute that she was aware of the consequences of deciding not to get vaccinated. She agrees that she made a personal choice and that she knew that her choice was in breach of her employer's policy.

[41] She does not agree, though, that this choice should be called misconduct.

[42] S. M. says that the policy that forced employees to undergo medical procedures (especially ones that she believes were experimental) was coercive and breached her personal rights to informed consent.

[43] She also argued that the requirement to receive COVID-19 vaccines was not part of her employment contract, and so failing to be vaccinated cannot be misconduct.

[44] Finally, the Appellant argued that principles of fairness and justice requires that the Employment Insurance plan support employees in her situation.

I find that the Commission has proven that there was misconduct.

[45] Based on the evidence, I find that the Commission has proven that S. M. behaviour amounted to misconduct. It has shown that she:

- (1) knew about the vaccination requirement;
- (2) knew that she could lose her job if she didn't follow the policy;
- (3) knowingly made a personal decision not to receive the vaccines; and
- (4) lost her job because she didn't comply with the vaccination requirements.

[46] As I explained above, I do not have the jurisdiction to decide if the policy was scientifically sound or whether the employer's policy was fair or reasonable. I do not have the authority to make determinations under consent legislation or the *Canada Labour Code*. I am limited to interpreting and applying the *Employment Insurance Act*. I can't make my decision based on other laws.

[47] The courts have said that employees who believe that they have been wrongfully let go from their job or discriminated against by their employer have other options available to them and can pursue actions against their employer in other forums. These solutions penalize the employer's behaviour rather than having taxpayers pay for the employer's actions through the Employment Insurance regime.¹⁹

[48] In a recent legal case, a worker appealing his EI denial before the Federal Court raised a number of very similar arguments to S. M. He too had lost his job at a hospital for refusing to receive COVID-19 vaccines.²⁰

[49] Like S. M., he argued that the policy at his workplace violated his right to medical choice, discriminated against workers who held certain beliefs and was not scientifically justified.

[50] His application for benefits had been denied by the Commission and that denial was upheld at both the General and Appeal Divisions of the the Tribunal. He sought judicial review at the Federal Court.

[51] The Federal Court judge that heard his case confirmed that the Tribunal was only permitted to consider and apply the *Employment Insurance Act*.

[32] While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the [Tribunal] unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[47] The SST-GD, and the Appeal Division, have an important, but narrow and specific role to play in the legal system. In this case, that role involved determining why the Applicant was dismissed from his employment, and whether that reason constituted "misconduct." That is exactly what they did, and the Applicant has not put forward any legal or factual argument that persuades me that the Appeal Division's decision is unreasonable.²¹

¹⁹ See *Canada (Attorney General) v. McNamara*, 2007 FCA 107

²⁰ *Cecchetto v. Canada (Attorney General)* 2023 FC 102

²¹ Paragraphs 32 and 47 of *Cecchetto v. Canada (Attorney General)* 2023 FC 102

[52] The *Employment Insurance Act* is an insurance plan created by a statute. Like other insurance policies, workers looking to collect benefits under the plan need to meet the specified conditions of the plan.²² The Tribunal's role is to determine whether the Appellant – the person seeking payment of benefits under the insurance policy – met the required conditions. It must follow the law and apply the Act.²³

[53] I have applied the EI Act and I find that the Appellant's conscious decision not to comply with her employer's vaccination policy meets the definition of misconduct.

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

[54] Based on my findings above, I find that the Appellant lost her job because of misconduct.

Conclusion

[55] The Commission has proven that S. M. lost her job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[56] This means that the appeal is dismissed.

Jillian Evans

Member, General Division – Employment Insurance Section

²² See *Pannu v. Canada (Attorney General)* 2004 FCA 90

²³ See *Canada (Attorney General) v Knee* 2011 FCA 301

