



Citation: *JM v Canada Employment Insurance Commission*, 2022 SST 1132

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: J. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (473279) dated May 30, 2022
(issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: In person

Hearing date: December 20, 2022

Hearing participant: Appellant

Decision date: December 28, 2022

File number: GE-22-2222

Decision

[1] I am dismissing the appeal. I disagree with the Appellant (Claimant).

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

Overview

[3] The Claimant was put on unpaid leave (suspended) and then dismissed from her job. The Claimant's employer says she was let go because she went against its COVID-19 vaccination policy. She refused to get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, she says that going against her employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Claimant lost her job because of misconduct. Because of this, the Commission decided the Claimant is disqualified from receiving EI benefits as of November 21, 2021, because that is the start date of her claim (benefit period).

[6] The Claimant appeals to the Social Security Tribunal. She says she was wrongfully dismissed because her employer broke her contract of employment. She worked for the provincial health services in the IT department. She had been working from home since March 2020 so being unvaccinated didn't pose a threat to her coworkers or patients. She applied for medical and religious exemptions but the employer refused both.

¹ See sections 30 and 31 of the *Employment Insurance Act* (Act).

Matters I have to consider first

Potential added party

[7] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Issues

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

Analysis

[9] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.²

[10] 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?

[11] I find the Claimant lost her job because she didn't comply with the employer's mandatory COVID-19 vaccination policy. Specifically, the employer advised their employees they had to be fully vaccinated by October 25, 2021.

[12] The Commission says the Claimant's employer put her on leave without pay (suspension) as of October 26, 2021, because she failed to comply with the employer's COVID-19 vaccination policy. When she remained unvaccinated, the employer dismissed her effective November 15, 2021. The employer warned the Claimant that

² See sections 30 and 31 of the Act.

she could be dismissed if she failed to report she had received the first dose of the COVID-19 vaccination could result in termination by November 15, 2021.

[13] The Claimant chose not to be vaccinated. She says she asked for clarification of the policy where it states it applies to “all employees” because she felt it shouldn’t apply to her because she was working from home. The Claimant agrees she was dismissed because she failed to comply with the employer’s COVID-19 vaccination policy.

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

[14] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[15] The *Employment Insurance Act* (EI Act) doesn’t say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant’s dismissal is misconduct under the EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[16] Case law says that to be misconduct, the conduct has to be wilful. This means the Claimant’s conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[17] 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 there was a real possibility of being let go because of that.⁶

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[18] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.⁸

[19] I have to focus on the EI law only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.⁹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

[20] The Commission has to prove the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Claimant lost her job because of misconduct.¹⁰

[21] The Commission says there was misconduct because the Claimant was aware of the employer's policy, and aware of the consequences of non-compliance. Despite this, the Claimant made the wilful and deliberate decision to not comply with the employer's policy. This wilful act of non-compliance constitutes misconduct as it led to the loss of employment.

[22] The employer implemented a policy and communicated it to employees. The Claimant was informed about the consequences of non-compliance with the policy. She attended meetings where she was clearly told if she remained unvaccinated, she could lose her job. After she was suspended, she confirmed that regardless of her work location she must still have the first dose of the vaccination before she would be allowed to return to work. The Claimant's dismissal was the direct result of her non-compliance.

⁷ See section 30 of the EI Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[23] The Claimant says refusing to get vaccinated against COVID-19 was not a wilful, intentional, or deliberate act because the employer had a duty to accommodate her religious exemption request. She says being unvaccinated didn't affect her ability to perform her duties because she was working from home. But the employer's policy clearly states it applies to all employees and she confirmed that it applied to her even though she had been working from home.

[24] I disagree with the Claimant when she says her appeal should be allowed because her circumstances are like those in a recent decision issued by the Social Security Tribunal General Division (*D.L. v C.E.I.C.*).¹¹ Although that claimant worked for a provincial health authority and asked for a religious exemption, the facts relating to that employer's policy and the claimant's letter for religious exemption are not the same as those in this case.

[25] In *D.L. v C.E.I.C.*, the Member noted that employer's COVID-19 policy states that employees who are not vaccinated for religious reasons will not be disciplined. In this case, the employer's policy clearly states a staff member must provide their employer with proof of vaccination or an exemption.¹² The policy also states, "a staff member who has provided proof of an exemption request may work until their request is responded to..."¹³ The Claimant testified that the employer clearly told her that her exemption requests were denied on October 25, 2021, the same day she was told she was being suspended.

[26] Further, in *D.L. v C.E.I.C.*, the Commission submits the letter from that claimant's religious leader shows it is a fundamental belief of their religion that precludes the claimant from getting a vaccine and there is no freedom of choice amongst the congregation, as the letter clearly outlines the church's position against vaccinations. But, in this case the Claimant's letter from her pastor states her religion, "does not

¹¹ See *D.L. v Canada Employment Insurance Commission (C.E.I.C.)*, GE-22-510.

¹² See the policy at page GD3-101.

¹³ See page GD3-105.

prohibit the use of most vaccines, and generally encourages them to safeguard persons and public health...”¹⁴

[27] In this case, the policy clearly states employees must declare their vaccination status and must be fully vaccinated unless they receive an approved exemption from the employer. The Claimant tried to get medical and religious accommodations, but they were refused. This means she was required to be vaccinated and report her vaccination status to comply with the policy.

[28] I acknowledge the Claimant has a right to decide whether to be vaccinated or disclose her vaccination status, but she knew there were consequences if she refused to follow the vaccination policy, which in this case was suspension and then dismissal from her employment. I also acknowledge the employer has a right to manage their day-to-day operations, which includes the authority to develop and impose practices and policies at the workplace, to ensure the health and safety of all their employees and clients.

[29] Whether or not the Claimant worked from home is irrelevant. This is because the duty owed to her employer was to comply with the vaccination policy, which was a condition of continued employment.¹⁵

[30] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment that is insured against must be involuntary. This is not an automatic right, even if a claimant has paid EI premiums.

[31] The Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law

¹⁴ See page GD2-11.

¹⁵ See *MN v Canada Employment Insurance Commission*, AD-22-628.

is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.¹⁶

[32] I do not have the authority to determine whether the employer's vaccination policy was unlawful. Equally, I do not have the authority to decide whether the employer breached any of the Claimant's rights as an employee when they dismissed her, or whether they could or should have accommodated her in some other way. The Claimant's recourse against her employer is to pursue her claims through a union, in Court, or any other tribunal that may deal with those particular matters.

[33] In my view, the Claimant didn't lose her job involuntarily. This is because the Claimant chose not to comply with the employer's policy, which is what led to her dismissal. She acted deliberately. She knew that refusing to get vaccinated was likely to cause her to lose her job. So I find the Claimant was dismissed from her job because of misconduct.

Conclusion

[34] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section

¹⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.