



Citation: *KJ v Canada Employment Insurance Commission*, 2023 SST 1348

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: K. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (546302) dated November 29, 2022 (issued by Service Canada)

Tribunal member: Benson Cowan

Type of hearing: Teleconference

Hearing date: June 26, 2023

Hearing participant: Appellant

Decision date: July 18, 2023

File number: GE-23-318

Decision

[1] The appeal is dismissed.

[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 the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant was suspended and then lost her job because she did not follow her employer's Covid-19 vaccination policy. She had been granted a religious exemption. She was first put on administrative leave and then she was permitted to work from home. The accommodation ended. She was suspended and then dismissed. She says she should have been permitted to continue working from home or accommodated in some other way.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

[5] Did the Appellant lose her because of misconduct?

Analysis

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

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

Why did the Appellant lose her job?

[7] I find that the Appellant lost her job because she did not comply with her employer's Covid-19 vaccination policy.

[8] The Appellant says she was given an accommodation for her religious beliefs that was then rescinded. She was given an opportunity to get vaccinated. She refused. She was suspended and then dismissed.

[9] The Commission appears to doubt that the Appellant received an accommodation. But it agrees that she was ultimately suspended and then dismissed for not following her employer's vaccine policy.

[10] The Commission did not have any contact with, or receive any information from, the Employer about this case. The Appellant told them that she had received an accommodation, but they say there was no evidence of this. That was not true. The Appellant had explained to them what happened. That was evidence. And they had no information from the employer or anywhere else that suggested otherwise. Further, on this appeal, the Appellant has provided a complete record of the correspondence that includes notification of the accommodation.²

[11] I find that the Appellant was given an accommodation for her religious beliefs. That accommodation was rescinded, and the Appellant was suspended and then dismissed for not complying with her employer's mandatory vaccine policy.

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

[12] The reason for the Appellant's dismissal is misconduct under the law.

[13] The *Employment Insurance Act* uses the word misconduct. That word can be misleading for claimants. This case highlights that concern. The Appellant was engaged in conduct that was respectful and based on deeply held religious beliefs. This conduct brought her into conflict with her employer's policies. While the law says otherwise, the

² See GD-6

plain meaning of the word misconduct may suggest to a claimant that they did something wrong. That is not always the case. And it is certainly not the case here. While it is an unfortunate word, it is the what the law says. So, I have to consider whether the Appellant's actions were misconduct.

[14] The Appellant 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.³ To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵

[15] 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 her employer and that there was a real possibility of being let go because of that.⁶

[16] The Commission has to prove that the Appellant 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 Appellant lost her job because of misconduct.⁷

[17] I can decide issues under the Act only. I can't make any decisions about whether the Appellant has other options under other laws. And it isn't for me to decide whether her employer wrongfully let her go or should have made reasonable arrangements or accommodations for her. I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[18] The Appellant was working at a nursing home. It was a difficult job, but she enjoyed it. One of the things she liked about it was that it allowed her to be of service to people and her community. When Covid-19 hit, her job became even more difficult. The

³ See *Attorney General of Canada v Secours*, A-352-94.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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

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

residents of the home were vulnerable to Covid-19. Public health rules meant there were restrictions on the residents seeing their families and any other visitors. The Appellant and her colleagues worked long hours under very difficult circumstances protecting the health and safety of the residents.

[19] On September 13, 2021, the Appellant was notified that her employer had instituted a vaccine policy in compliance with a mandate from Alberta Public Health. The policy required her to be fully vaccinated by October 31, 2021. On October 20, 2021, the deadline was changed to November 30, 2021.

[20] The policy allowed for employees to ask for a workplace accommodation for medical reasons or for other protected grounds under the Alberta Human Rights Act. Employees who did not receive an accommodation or were not fully vaccinated by the deadline would be placed on an unpaid leave of absence until they complied. If, by January 10, 2022, an employee had no plan or intention to become fully vaccinated, they would be dismissed.

[21] The Appellant says that when the first Covid-19 vaccines were released she did some research that linked the production of the vaccine to the use of products and research derived from human fetal cells. The use of any product that relied on fetal cell lines was contrary to her religious beliefs. She applied for an accommodation on the basis of her religious beliefs. In support she provided a letter from a minister and leader in her church.

[22] On November 29, 2021, the Appellant was granted an accommodation. She was placed on a leave of absence from December 1, 2021 to February 28, 2022. The leave of absence would be re-evaluated before February 28, 2022.

[23] On February 16, 2022, the Appellant's employer changed the nature of her accommodation. She was given work that she could do remotely. She worked two days a week on a range of financial and clerical tasks.

[24] On April 20, 2022, the Appellant's employer sent her a letter saying that a new vaccine was available that had "no connection" to fetal cell lines. Her employer set up a meeting to discuss whether she still qualified for an accommodation.

[25] The Appellant did more of her own research. On the basis of the research, she believed that the production of the new vaccine was still linked to fetal cell lines. She did not feel that she could agree to a vaccine in these circumstances. She sought an extension of her accommodation on this basis.

[26] On May 17, 2022, the Appellant's employer sent her a letter saying that it would not continue her accommodation. Her accommodation was going to end on May 31, 2022. If she was not fully vaccinated by then, she would be suspended. If she did not have a plan or intention to get vaccinated by July 4, 2022, she would be dismissed.

[27] The Appellant, for the reasons described above, maintained her choice to not get vaccinated. On July 4, 2022, the Appellant was dismissed from her job.

[28] The Commission says that the Appellant's actions were misconduct under the law. She knew that she would be suspended and then dismissed if she did not comply with her employer's vaccine policy.

[29] The Appellant took issue with some of the submissions made by the Commission. For example, the Commission said that she was "anti-vaccine." She says that it misstated and misunderstood the nature of her position. She says she was not opposed to vaccines but could not use a product that was derived from the use of fetal cells. Further, she was frustrated by the Commission's characterisation of her religious beliefs. The Commission said that the letter she provided from her pastor left it to her individual choice to be vaccinated or not. They told her she would need a letter saying her religion left her no choice. She says this is not how religious belief works – people are not ordered to think or do something by their church.

[30] I agree with the Commission regarding the Appellant's dismissal. I find that the Appellant was suspended on June 1, 2022 and then dismissed on July 4, 2022 because

she breached her employer's vaccine policy. She knew that this could happen if she refused to get vaccinated once her accommodation ended.

[31] The Appellant disagreed with the policy. She found it disappointing that her employer continued to follow it even after it was no longer mandated by Alberta Public Health. She felt betrayed by her employer. And she felt that she was entitled to an ongoing accommodation. But throughout the whole process she knew that her employer would suspend and dismiss her if she did not get vaccinated.

[32] I share some of the Appellant's concerns about the Commission's mischaracterisation of her position and their insensitive and inaccurate discussion of her religious belief. While the Appellant may not have been entitled to an ongoing accommodation, there was no question that her beliefs were genuine and important to her. She took the time and effort to explain to explain them carefully and politely. She was entitled to have them accurately recorded and respected.

[33] I have explained my concerns with the term misconduct above. But it is the word used in the law and I have to apply the law. Based on my findings above, I find that the Appellant lost her job because of misconduct.

Conclusion

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

[35] This means that the appeal is dismissed.

Benson Cowan
Member, General Division – Employment Insurance Section