



Citation: *AW v Canada Employment Insurance Commission*, 2022 SST 1165

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: A. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (479634) dated July 20, 2022
(issued by Service Canada)

Tribunal member: Peter Mancini

Type of hearing: Videoconference

Hearing date: November 15, 2022

Hearing participants:
Appellant
Respondent

Decision date: December 29, 2022

File number: GE-22-2804

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was placed on unpaid leave from her job because of misconduct (in other words, because she did something that caused her to be placed on unpaid leave from her job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was placed on unpaid leave/ suspended from her job. The Claimant's employer did not return calls to the Commission, however the Claimant said that she was placed on a leave of absence because the employer said she refused to follow the employer's vaccination policy

[4] Even though the Claimant doesn't dispute that she did not comply with the employer's policy, she says that it isn't the real reason why the employer placed her on unpaid leave from her from her job. The Claimant says that the employer took this action because she applied for an exemption under the policy, which was for religious reasons. She applied for this after the deadline for employees to provide proof of vaccination. She said there was no clear deadline for applying for an exemption, and she should have been allowed to work remotely while her employer considered her request.

[5] The Claimant also said that it was not for the Commission to decide if her application for religious exemption was legitimate. She said they did not have the authority to request that information from her.

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

[6] The Commission determined that the Claimant was placed on unpaid leave from her job because of misconduct. The Commission considers being placed on unpaid leave by the employer is the same as being suspended from work. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

[7] The Commission also requested proof from the Claimant that she had requested a religious exemption and the Commission wanted details that they say the Claimant refused to provide.

Issue

[8] Was the Claimant placed on unpaid leave from her job because of misconduct?

Analysis

[9] To answer the question of whether the Claimant was placed on unpaid leave 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 or laid off from her job. Then, I have to determine whether the law considers that reason to be misconduct

Why did the Claimant get placed on an unpaid leave from her job?

[10] I find that the Claimant was placed on unpaid leave from her job because she initially did not follow the employer's vaccination policy. The policy set a deadline for employees to be vaccinated. The policy provided exemptions for religious and medical reasons. The Claimant eventually applied for an exemption in February 2022, but it was after the date when employees had to provide proof of vaccination or apply for an exemption, which was November 22, 2021.

[11] The Claimant and the Commission don't agree on why the Claimant was placed on unpaid leave from her job. The Commission says that the reason the Claimant was placed on unpaid leave was because she did not follow the company policy and that she applied for an exemption after the deadline to do so had passed.

[12] The Claimant disagrees. The Claimant says that the real reason she was placed on unpaid leave is a refusal by the employer to accommodate her. She says other employees were allowed to be exempt based on religious reasons.

[13] I find that the Claimant applied for a religious exemption from the employer's policy, however she applied for this exemption on February 9, 2022, several months after the employer had set a deadline for employees to comply with the policy. Complying with the policy means that the Claimant should have applied for an exemption before November 22, 2021.

[14] The employer's policy stated that "effective November 8th 20021 all employees must provide proof of full vaccination to their excluded manager, an included supervisor or a specific manager. Employees who do not provide proof of vaccination or refused to disclose their vaccination status by November 22 2021 will be considered unvaccinated". The policy provided for exemptions and accommodations. It read that "effective November 8, 2021 employees may request an exemption for the vaccine requirement based on a medical condition or other protected ground as defined under B.C's Human rights code". The policy stated the exemption request had to be made in writing and that employees with pending requests for exemptions may be offered alternative work arrangements while their request for exemption is being assessed.

[15] The policy also said that unvaccinated employees except those who requested and/or had been granted a medical exemption or other accommodation will be placed on leave without pay for 3 months. Employees who have not become at least partially vaccinated may be terminated. It was clear that by November 22nd employees had to have been vaccinated or had to have applied for an exemption. If the exemption decision was still under review on November 22nd alternative work arrangements would be made for those employees until a final decision was made.

[16] The Claimant said she knew the policy, it was distributed to the employees. She knew that non compliance with the policy would result in a suspension without pay. She did not apply for an exemption within the policy timeline which was before November

22, 2021, nor did she provide proof of vaccination. Rather, she applied for a religious exemption on Feb.9th, 2022 and was granted the exemption August 18th 2022.

[17] The Claimant said she found the roll out of the policy difficult. She felt she did not have enough time to evaluate the policy. She needed to reconcile her faith with the policy. She knew she might qualify for an exemption but could not deal with applying for the religious exemption within the policy timeline. She felt the form that she had to fill out to apply for the religious exemption was very hurtful and may even have been discriminatory. She had a long and good history with her employer, but she found this exemption form emotionally difficult to prepare. I find that there was sufficient time for the Claimant to consider her position. I have considered this factor when determining that the Claimant's actions were deliberate.

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

[18] The reason for the Claimant's dismissal is misconduct under the law.

[19] 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

[20] 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

[21] 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.

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.

This means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.⁶

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

[23] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide⁸. I can consider only one thing, whether what the Claimant did or failed to do is misconduct under the Act.

[24] The Commission says that there was misconduct because the Claimant knew what the employer's policy was and deliberately and willfully failed to comply with it.

[25] The Claimant says that there was no misconduct because she was always available for work, and that she did apply for an exemption, although it was after November 22, 2021, which was the deadline for compliance with the policy

[26] I find that the Commission has proven that there was misconduct, because the Claimant knew the details of the employer's policy. She knew that an exemption had to be applied for within the time frame of the policy. She found this difficult to do and, knowing the consequences did not apply for the exemption within the timeline. This was a deliberate decision on her part. She knew that by not following the policy there was a real possibility she might be suspended without pay from her job. She did eventually find that she could apply for an exemption and did so, but it was not in compliance with

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

⁷⁷ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107

⁸ See *Canada (Attorney General) v McNamara* 2007 FCA 107

the policy timeline. The suspension ended on August 18th when her application for an exemption was accepted.

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So, was the Claimant placed on unpaid leave from her job because of misconduct?

[27] Based on my findings above, I find that the Claimant was placed on unpaid leave from her job because of misconduct.

Conclusion

[28] The Commission has proven that the Claimant was placed on unpaid leave from her job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits until August 18th 2022.

[29] Because I find the Claimant is disentitled for benefits because of misconduct I do not need to rule on the issue of whether the Commission had the authority to request proof of the application for religious exemption. Moreover the authority of the Tribunal stems from section 113 of the EI Act, so I can only decide on the matters raised in the Commission's reconsideration decision. Further I am looking at the Claimant's appeal de novo.

[30] This means that the appeal is dismissed with modifications.

Peter Mancini

Member, General Division – Employment Insurance Section