



Citation: *RM v Canada Employment Insurance Commission*, 2023 SST 1953

**Social Security Tribunal of Canada
General Division – Employment Insurance Section**

Decision

Appellant: R. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (495577) dated July 12, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Teleconference

Hearing date: September 19, 2023

Hearing participant: Appellant

Decision date: September 19, 2023

File number: GE-23-1142

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

Overview

[3] The Appellant lost her job. The Appellant's employer says that she was suspended because she went against its vaccination policy: she didn't say whether she had been vaccinated.

[4] Even though the Appellant 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 suspension. It decided that the Appellant lost her job because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

[6] The Appellant says that the policy is against several laws and legal principles. She says that the vaccine wasn't necessary and wasn't related to her duties. She says that she didn't have enough information to make an informed decision about taking the vaccine.

¹ Section 31 of the *Employment Insurance Act* (Act) says that Appellants who are suspended because of misconduct are disentitled from receiving benefits, until certain conditions are met.

Issue

[7] Did the Appellant lose her job because of misconduct?

Analysis

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

[9] 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.

Why did the Appellant lose her job?

[10] I find that the Appellant lost her job because she went against her employer's vaccination policy.

[11] The Appellant says that she lost her job because she went against her employer's vaccination policy. She says that she was suspended without pay in November 2021 and then dismissed in January 2022. She says that she was later reinstated and returned to work January 3, 2023. However, she says that she didn't agree to be suspended (or put on a leave of absence) by her employer.

[12] The Commission says that the Appellant lost her job because she went against her employer's vaccination policy. It says that its decision to disqualify the Appellant for being dismissed for misconduct should be changed. Instead, it says that the Appellant should be disentitled from EI benefits due to the suspension for misconduct.

[13] The employer told the Commission that the Appellant didn't provide proof of vaccination, as required by its mandatory vaccination policy.³

² See sections 30 and 31 of the Act.

³ See GD3-29.

[14] The employer reinstated the Appellant in letter December 10, 2022, saying that mandatory vaccination is no longer required, as of December 1, 2022. It says that she is reinstated and her first day to return to work is January 3, 2023.⁴

[15] I find that the Appellant was suspended from her job because she went against her employer's vaccination policy. I rely on the letter from the employer, that says that she has been reinstated, to show that she was suspended, not dismissed.

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

[16] The reason for the Appellant's suspension is misconduct under the law.

[17] 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 suspension is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[18] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

[19] 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 losing her job because of that.⁸

⁴ See GD7-87 and 88.

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

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[20] The law doesn't say I have to consider how the employer behaved.⁹ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.¹⁰

[21] I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.¹¹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[22] 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.¹²

[23] The Commission says that there was misconduct because:

- the employer had a vaccination policy
- the employer notified the Appellant about its expectations to tell it whether she had been vaccinated
- the Appellant made a personal decision to not follow the policy
- the Appellant knew or should have known what would happen if she didn't follow the policy

⁹ See section 30 of the Act.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Minister of Employment and Immigration v Bartone*, A-369-88.

[24] The Appellant says that there was no misconduct because:

- the policy is against several laws and legal principles, including her collective agreement, informed consent, privacy legislation, the Criminal Code, the Canadian Bill of Rights, the Health Care Consent Act, the Occupational Health and Safety Act, and the Nuremburg Code
- the vaccine wasn't necessary, as she was working from home
- taking the vaccine wasn't related to her workplace duties
- the vaccine is unsafe and/or she didn't have enough information to make an informed decision

[25] The employer told the Commission about its mandatory COVID-19 vaccination policy, as follows:¹³

- employees were notified of the policy by email on August 19, 2021
- the policy was effective as of September 7, 2021
- the policy required employees to provide proof of full vaccination by October 30, 2021, or face disciplinary action, including dismissal
- employees working from home were required to follow the policy

[26] The Appellant testified that she was aware of the policy, the deadline to comply, and the consequences for not following the policy, as above. She says that she didn't follow the policy, as she didn't tell her employer whether she had been vaccinated.

[27] The Appellant says that she worked for the employer for 20 years. She says that she was working from home.

¹³ See GD3-29.

[28] The Appellant says that she wanted to be fully informed before taking the vaccine. She says that she wrote to her employer in October 2021, requesting information about the risks of taking the vaccine, proof of its effectiveness, and confirmation that the employer will accept liability. She says that her employer didn't respond.

[29] The Appellant says that she is assisted by her union in pursuing her employer. She says that the matter is in arbitration.

[30] I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that required employees to be vaccinated against COVID-19
- the employer told the Appellant about what it expected of its employees in terms of getting vaccinated and telling it whether they have been vaccinated
- the employer sent an email to the Appellant to communicate what it expected
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy

[31] The Federal Court recently said that, by making a personal and deliberate choice not to follow the employer's vaccination policy, the employee breached duties owed to his employer and lost his job because of misconduct under the EI Act. The Court said that there are other ways the employee's claim can be brought forward in the legal system.¹⁴ I am bound by this decision and am following it. In the Appellant's case, she is pursuing her employer through arbitration, with the assistance of her union.

¹⁴ See *Cecchetto v. Canada (Attorney General)*, 2023 FC 102.

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

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

[33] This is because the Appellant's actions led to her suspension. She acted deliberately. She knew that refusing to say whether she had been vaccinated was likely to cause her to lose her job.

Conclusion

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

[35] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section