



Citation: *MD v Canada Employment Insurance Commission*, 2024 SST 1151

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

Decision

Appellant: M. D.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (481757) dated June 27, 2022 (issued by Service Canada)

Tribunal member: Elizabeth Usprich
Type of hearing: Teleconference
Hearing date: December 29, 2022
Hearing participant: M. D.
Appellant
Decision date: January 3, 2023
File number: GE-22-2581

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has not proven that the Claimant lost her job because of misconduct (in other words, because she did something that caused her to lose her job). This means that the Claimant is not disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant worked as a Financial Analyst at a hospital and she lost her job. The Commission says she was let go because she went against the employer's vaccination policy and did not get vaccinated and did not receive an exemption (accommodation).

[4] Even though the Claimant does not dispute that this happened, she says that she did not go against her employer's vaccination policy. She says that she followed what the policy said. The Claimant says that the policy was not clear on the consequences for not being vaccinated. The Claimant also says that what she did was not misconduct.

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

Issue

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

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

Analysis

[7] 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

[8] 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.

Reason the Claimant was no longer working

[9] I find that the Claimant was not working because her employer let her go on October 22, 2021.

[10] The record of employment shows that she was dismissed.³ This is also consistent with the Claimant's testimony.

[11] The Claimant testified that she was told by her employer on October 15, 2021, that by not getting vaccinated and by not having an accommodation, that she would be terminated effective October 22, 2021. The Claimant says that until that date she did not know that she would be let go.

Employer's Policy

[12] The Claimant says that her employer had a COVID-19 vaccination policy. The Claimant says that when the policy was revised and put into effect, September 3, 2021⁴ she was on vacation. As soon as she returned, she found the email from her employer that contained the policy. The Claimant says that she had a lot of questions about the policy and was not sure whether it applied to her as she had been working from home.

² See sections 30 and 31 of the Act.

³ See GD3-22.

⁴ See GD3-34.

[13] The Claimant started with her employer in July 2015. The Claimant says that she was one of a limited group of people that were authorized to work from home. To facilitate this her employer had provided her with VPN access so that she was able to do her job from any location. In March 2020, her manager had told her, and her similarly positioned colleagues, that they should exclusively work from home.

[14] The Claimant testified that when the policy dated September 3, 2021 came into effect there was no meeting or information session about it. The Claimant says that there had been a previous policy in place but there were significant changes to the current one and her employer had not supplied employees with any summary of changes.

[15] The Claimant's manager was on vacation when the policy came out so the Claimant wrote directly to the Human Resources (HR) department to find out if the policy applied to her because she was not an on-site employee.

[16] The Claimant says that there was a Town-Hall type meeting where several executives were there to answer questions. The Claimant says that she asked about whether the policy applied to off-site employees and she was not given an answer. The Claimant says that the executives told her that HR would have to answer that question.

[17] The Claimant says that her email to HR was answered later that day and they explained that the policy did apply to off-site employees and that she would have to do antigen testing. The Claimant says that she complied with the policy and commenced antigen testing as it required.⁵ The Claimant also says that she had previously completed the online education program about vaccination that had been available since the summer of 2021.

[18] The employer's vaccination policy⁶ was effective as of July 5, 2021 but the reviewed date indicates September 3, 2021. It says that staff are required to complete a COVID-19 vaccination e-learning program; and staff must provide documentation

⁵ See GD3-35.

⁶ See GD3-34 to GD3-37.

showing their vaccination or provide proof of a medical exemption. The policy also gave information about rapid antigen testing and that this was required for those that have an accommodation (exemption). The policy notes that “Beginning October 22, 2021, only those with a valid medical exemption or those with exemption under the Human Rights code will be provided this accommodation”.⁷

[19] The policy also says “to be considered immunized/vaccinated, all vaccinated staff and affiliates must provide proof of vaccination to Occupational Health and Safety Services (OHSS) as applicable. Staff and Affiliates will be given the option to withhold this information; however, staff and affiliates who choose not to declare their status will be considered to be **not** vaccinated. Documentation of vaccine status will be kept in the OHSS files. (1) Staff and Affiliates who are deemed to be not vaccinated may be accommodated per this policy due to : a confirmed medical contraindication..., or (2) A reason that is verified as applicable under the Ontario Human Rights Code.”⁸

Consequences of not complying with the policy

[20] The policy then indicates that only staff that are not vaccinated as a result of an accommodation (medical exemption or reason under the Ontario Human Rights Code), “will be accommodated and provided with rapid testing kits that must be self-administered at home. Staff and affiliates who are working on-site will be required to perform antigen testing three times a week on Mondays, Wednesdays and Fridays.”⁹

[21] The policy then indicates “all other staff and affiliates who are deemed not vaccinated per this policy will NOT be accommodated and will not be allowed to report to work. They will be placed on an unapproved, unpaid leave of absence until they are 14 days past being fully vaccinated.”¹⁰

[22] The only part of the policy, provided by the Commission, that says anything about termination of employment is with respect to rapid test kits. That portion of the

⁷ See GD3-34.

⁸ See GD3-34.

⁹ See GD3-35.

¹⁰ See GD3-35.

policy, which does not apply in this case, says “Rapid test kits distributed to those staff members by [employer] are to be used only by the staff affiliates who receive them. The rapid tests may not be given or sold to any other person. Failure to comply with the terms of this policy, including falsifying test results, the prohibition on distributing the rapid tests, may result in discipline, up to and including termination of employment or revocation of privileges.”¹¹

Accommodation Request

[23] The Claimant says that after her manager returned from vacation they discussed whether or not the Claimant had to submit an accommodation request pursuant to the *Ontario Human Rights Code*. The manager, on behalf of the Claimant, communicated with HR and the result was that the Claimant would be required to submit an accommodation request if she wanted to be exempt from the policy.

[24] The policy says that one had to “provide documentation for an exemption under Human Rights to People Services”.¹² The policy does not give information about what documentation is required or any due date.

[25] The Claimant testified that she was sent an email from HR with a link to the Human Rights Tribunal of Ontario (HRTO). The Claimant was under the belief that she had to submit the accommodation request to the HRTO so she did. She has not received a response from the HRTO as of the date of this hearing.

[26] The Claimant says that HR sent out a general email communication the week of September 27, 2021. This email said that for those seeking an accommodation (exemption) under the policy that the request had to be received by HR by no later than October 1, 2021.

[27] On October 1, 2021, since she had not received a response from the HRTO, the Claimant forwarded her accommodation request to her HR department.

¹¹ See GD3-35.

¹² See GD3-34.

[28] Within a few hours, the Claimant says she received a response from the HR department that denied her accommodation request.¹³ The Claimant says that after receiving the accommodation denial she wrote to the HR department, the same day, to ask if they needed additional documentation. The Claimant says that she felt that her HR department did not fully consider her accommodation request given the speed in which they responded to her.

[29] The Claimant says that shortly after she wrote to HR about her concerns and if they needed more information she got a message from her manager that an investigative meeting had been scheduled for October 15, 2021. The Claimant testified that she assumed it was about the accommodation request as she was not given any kind of agenda or further information.

[30] On October 15, 2021, the Claimant attended the investigative meeting. The meeting was virtual and her manager and a representative from HR was present. The Claimant says that the HR representative was not the same person that wrote the accommodation denial letter to her.

[31] The Claimant says that she was asked three questions at the meeting: "Are you aware that there is a COVID-19 vaccination policy?" The Claimant responded that she was aware. "Have you taken the vaccine?" The Claimant said she had not. "Are you planning to take the vaccine?" The Claimant says that she replied no and then tried to explain her answer. The Claimant says she wanted an opportunity to talk about her accommodation request. The Claimant asked the HR representative if she knew about the accommodation request. The representative said that if the HR Manager did not approve the accommodation request then it is not approved. The Claimant says that she was not permitted to have any further discussion. The Claimant says that she was then told that as of the following Friday, October 22, 2021, she would be terminated from her position. This was the first time the Claimant says she became aware that she

¹³ See GD2-13.

could be terminated from her position as the policy only said that unvaccinated employees would be placed on a leave.¹⁴

October 22, 2021

[32] The following Friday the Claimant was told that she was required to attend at her workplace to return any corporate assets. The Claimant says that she complied. The Claimant says that she was handed a termination letter¹⁵ at that time. The Claimant says that there were several inconsistencies in the letter and things that she felt were simply incorrect. For example, the letter says that it was sent by registered mail and it was not. The letter says that there was a meeting on October 13, 2021. This is incorrect she says that the date was October 15, 2021.

[33] The Claimant says that the letter is also incorrect on several facts. For example it says “to ensure that you fully understood the outcome of not complying with the requirement to be fully vaccinated, we met with you in person on October 13, 2021 to: (1) confirm that you understood this requirement, which you said you did”.¹⁶ The Claimant says that she was only asked the three question as outlined above. Specifically, she was only asked if she was aware of the policy. The Claimant does not deny being aware of the policy. The Claimant says that it is not in the policy, nor was it ever explained to her that she could lose her job if she was not vaccinated.

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

[34] The reason for the Claimant’s dismissal is not misconduct under the law.

[35] 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 Claimant’s dismissal is misconduct under the Act. It sets out the legal test for

¹⁴ See GD3-35.

¹⁵ See GD2-20 to GD2-22.

¹⁶ See GD3-21.

misconduct—the questions and criteria to consider when examining the issue of misconduct.

[36] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁸ 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.¹⁹

[37] 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.²⁰

[38] The law doesn't say I have to consider how the employer behaved.²¹ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.²²

[39] I only have the power to decide questions under the Act. I cannot 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 are not for me to decide.²³ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[40] The Commission has to prove that the Claimant lost her job because of misconduct. The Commission has to prove this on a balance of probabilities. This

¹⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁹ See *Attorney General of Canada v Secours*, A-352-94.

²⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²¹ See section 30 of the Act.

²² See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

means that it has to show that it is more likely than not that the Claimant lost her job because of misconduct.²⁴

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

- the employer had a vaccination policy;
- the employer clearly notified the Claimant about its expectations about getting vaccinated; and
- the Claimant knew or should have known what would happen if she didn't follow the policy.

[42] The Claimant says that there was no misconduct because:

- the employer's vaccination policy was unclear;
- the policy did not set out clear procedures for seeking accommodation; and
- the policy did not say that the Claimant could lose her job if she didn't get vaccinated.

[43] I find that the Commission has not proven that there was misconduct for the following reasons.

Four Elements of Misconduct

[44] There are four elements to misconduct. All four elements must be proven for a finding of misconduct. The Claimant's actions must be wilful (conscious, deliberate, intentional); the Claimant must have known, or ought to have known, that it would cause problems carrying out duties towards the employer; the Claimant must have known, or ought to have known, that there was a real possibility in being let go; and the alleged misconduct caused the termination.

²⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[45] The Claimant testified that she made a religious-based decision to not be vaccinated based on her strongly held beliefs. The Claimant testified that the Vatican had identified that it was not a moral obligation to take the vaccine and instead was a conscious choice. The Claimant admitted that it was her personal choice to not be vaccinated. I find no evidence to contradict this. Therefore, her choice can be considered wilful as she made a conscious, intentional and deliberate choice to not be vaccinated.

[46] The Claimant disputes that her choice to not be vaccinated interfered with her ability to carry out duties owed to her employer. The Claimant said that she was work from home and had never been in a public-facing role. Despite this, the Claimant was informed that the vaccination policy applied to her even though she was work from home. The Claimant applied for an accommodation based on her religious beliefs but the request was denied. Therefore, without being vaccinated or having an exemption, the Claimant was not in compliance with her employer's policy.

[47] However, the Claimant denies that it was ever explained that she could lose her job as a result. The employer's policy itself only stated that an employee would be "placed on an unapproved, unpaid leave of absence until they are 14 days past being fully vaccinated."²⁵

[48] The policy does not say that those without an exemption/accommodation who are unvaccinated will be terminated if they do not comply with the policy.

[49] The Claimant testified that made attempts to clarify the policy with both executives and the HR department. There were not clear answers. The Claimant testified that while it was a fear that she would lose her job she did not believe that would happen because the policy did not say that.

²⁵ See GD3-35.

[50] The Commission was unable to seek clarification from the employer.²⁶ The Commission has no documents from the employer that would corroborate that the Claimant knew, or should have known, that she could have lost her job.

[51] The only piece of evidence about termination of employment came from the Claimant. That document was given to her on the day of her termination.²⁷ The Claimant testified under oath that she had no knowledge that she would be losing her job until she was given less than one week's notice that she would be terminated. I find no evidence to contradict this.

[52] Therefore, I find that the Commission has not proven, on a balance of probabilities, that the Claimant knew, or should have known, about the possibility of being let go for not taking the COVID-19 vaccine.

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

[53] Based on my findings above, I find that the Claimant did not lose her job because of misconduct.

Conclusion

[54] The Commission has not proven that the Claimant lost her job because of misconduct. Because of this, the Claimant is not disqualified from receiving EI benefits.

[55] This means that the appeal is allowed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section

²⁶ See GD4-2.

²⁷ See GD2-20.