



Citation: *SP v Canada Employment Insurance Commission*, 2022 SST 570

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

Decision

Appellant: S. P.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (451422) dated February 5, 2022
(issued by Service Canada)

Tribunal member: Solange Losier
Type of hearing: Teleconference
Hearing date: April 28, 2022
Hearing participant: Appellant (Claimant)
Decision date: April 29, 2022
File number: GE-22-533

Decision

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

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

Overview

[3] The Claimant worked in an information technology role for the government. The employer suspended him because he did not comply with their covid19 vaccination policy. The Claimant then applied for Employment Insurance regular benefits.²

[4] The Commission decided that the Claimant was not entitled to receive benefits because he was put on a mandatory leave of absence and dismissed due to his own misconduct for failure to comply with their policy.³

[5] The Claimant disagrees because his employer breached various federal and provincial laws, case law and their own internal procedures.⁴ He says that the employer had no legal right to force their employees to take an experimental vaccine and disclose private medical information.

Matter I have to consider first

[6] The Claimant disputes that he was dismissed from his employment. He was put on a mandatory leave of absence effective November 15, 2022. He still has a company cell phone, laptop and other company equipment. He has not received notification from

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

² See application for benefits at GD3-3 to GD3-15.

³ See initial decision dated December 9, 2021 at GD3-21 to GD3-22 and reconsideration decision dated February 5, 2022 at GD3-56 to GD3-57.

⁴ See notice of appeal at GD2-1 to GD2-17.

his employer that he has been dismissed. The record of employment in the file shows that he is on a leave of absence.⁵

[7] At the hearing, the Claimant asked to review his Service Canada account after the hearing to see if the employer has issued a subsequent record of employment dismissing him. If so, he was going to send a copy to the Tribunal.

[8] I allowed the Claimant's request to submit this information after the hearing because it is relevant. After the hearing, the Claimant confirmed that to his knowledge there was no other record of employment issued by the employer.⁶

Issue

[9] Was the Claimant suspended from his job due to his own misconduct?

Analysis

[10] The law says that Claimants who lose their job because of misconduct are disqualified from receiving benefits.⁷

[11] It also says that Claimants who are suspended from their employment because of their misconduct are disentitled from receiving benefits, until their period of suspension expires, or they lose or voluntarily leaves their employment, or if they accumulate enough hours with another employer after the suspension started.⁸

Why was the Claimant suspended from his job?

[12] I find that the Claimant was put on a mandatory leave of absence (suspended) from his employment on November 15, 2021.

[13] I find that the reason for the suspension was because he did not comply with the employer's "Policy on covid19 vaccination for the core public administration including the Royal Canadian Mounted Police" and "Covid19 vaccination requirement for federal

⁵ See record of employment at GD3-16.

⁶ See GD12-1 to GD12-2.

⁷ Section 30 of the Act.

⁸ See section 31 of the Act.

public servants” (policy).⁹ This is consistent with the Claimant’s testimony and evidence in the file.¹⁰

What was the employer’s policy?

[14] The employer’s policy became effective October 6, 2021 and is included in the file.¹¹ The Claimant testified and told the Commission that he received a copy of the policy by email on October 6, 2021.¹²

[15] The policy requires that employees are fully vaccinated and to disclose by attesting to their vaccination status by October 29, 2021.¹³

[16] It provides for accommodation based on a certified medical contraindication, religion or another prohibited ground of discrimination as defined under the Canadian Human Rights Act.

What were the consequences of not complying with the policy?

[17] The policy says that employees who are unwilling to be fully vaccinated or to disclose their vaccination status will be required to attend an online training session on covid19 vaccination.¹⁴

[18] It says that two weeks after the attestation deadline of October 29, 2021, employees will be restricted from accessing the workplace, off-site visits, business travel and conferences, as well put on administrative leave without pay.

[19] It allows the employer to take appropriate action to address non-compliance issues or may impose any other measures deemed appropriate.

⁹ See policy at GD3-35 to GD3-55.

¹⁰ See GD3-6; GD3-16; GD2-7 to GD2-8; GD2-16 to GD2-17.

¹² See supplementary record of claim dated December 3, 2021 at GD3-19.

¹³ See GD3-47.

¹⁴ See GD3-44.

[20] The Claimant agreed that he was aware he would put an unpaid leave of absence if he did not follow the policy by not getting vaccinated.¹⁵

[21] This is consistent with the employer's letter on November 1, 2021 that says "should you not comply with the policy, you will be placed on administrative leave without pay as early as November 15, 2021 and until such time as you comply with the policy".¹⁶

[22] The employer also wrote on November 12, 2021 that the Claimant would be placed on administrative leave without pay, effective November 15, 2021 for not complying with their policy.¹⁷

Is there a reason the Claimant could not comply with the policy?

[23] The Claimant told the Commission that he did not request an accommodation from his employer because it was his personal choice to get vaccinated and disclose his vaccination status.¹⁸

[24] The Claimant testified that he did not file for accommodation or exemption from the policy based on medical or religious grounds because he did not need one as the policy was illegal.

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

[25] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁹ Misconduct also includes conduct that is so reckless that it is almost wilful.²⁰ The Claimant does not have to have

¹⁵ See supplementary record of claim dated February 4, 2022 at GD3-31.

¹⁶ See letter dated November 1, 2021 at GD3-7 to GD3-8.

¹⁷ See letter dated November 12, 2021 at GD3-16 to GD3-17.

¹⁸ See supplementary record of claim dated December 3, 2021 at GD3-19.

¹⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²⁰ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

wrongful intent (in other words, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.²¹

[26] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer and that there was a real possibility of being let go because of that.²²

[27] The Commission has to prove that the Claimant lost his 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 Claimant lost his job because of misconduct.²³

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

[28] I find that the reason for the Claimant's suspension is misconduct under the law for the following reasons.

[29] First, I find that the Claimant willfully and consciously chose to not comply with the employer's policy and knew the consequences of not complying would result in a suspension or mandatory leave of absence. The Claimant agreed that the policy was clearly communicated to him on October 6, 2021 and he knew that he had to comply by October 29, 2021.

[30] The court has stated that Tribunals have to focus on the conduct of the Claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the Claimant such that this would constitute unjust dismissal, but whether the Claimant was guilty of misconduct and whether this misconduct resulted in losing their employment.²⁴ In this case, the Claimant made a deliberate choice not to comply with the employer's policy, which I have decided is misconduct because it was a breach of their policy that resulted in a suspension.

²¹ See *Attorney General of Canada v Secours*, A-352-94.

²² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

²³ See *Minister of Employment and Immigration v Bartone*, A-369-88.

²⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

[31] Second, the *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human Rights Code*²⁵ as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.²⁶

[32] In this case, the Claimant has failed to prove that he was exempt from the employer's policy based any human rights grounds, even though the policy provided an option for making such a request. Even if the Claimant feels the policy was illegal that did not prevent him making a request for an exemption and accommodation.

[33] Third, I find that the employer has a right to manage their day-to-day operations, which includes the authority to develop and impose policies at the workplace to ensure the health and safety of employees during the covid19 pandemic.

[34] Lastly, I do not accept that the Claimant was being forced to vaccinate, but rather he had a choice. He chose to not get vaccinated for personal reasons and this led to undesirable outcomes, a leave of absence and loss of income.

[35] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment which is insured against must be involuntary.²⁷

[36] In this case, the Claimant's employment was not terminated involuntarily because it is clear that he chose not to comply with the employer's policy for personal reasons and was suspended for that conduct.

²⁵ *Human Rights Code*, R.S.O. 1990, c. H.19.

²⁶ See article titled "OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates" dated September 22, 2021 at https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates.

²⁷ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

What if the Claimant disagrees with the employer's policy and penalty?

[37] The Claimant disagrees with the employer's policy for a variety of reasons, including some of the following²⁸:

- a) He does not want to disclose his vaccination status and his medical health is protected by privacy laws
- b) His privacy is protected by law
- c) He will not consent to any type of covid19 testing
- d) His medical information is confidential
- e) His Charter Rights includes the right to liberty and refuse medical treatment

[38] I do not have the authority to decide whether the employer breached any of his rights by putting the Claimant on a mandatory unpaid leave of absence or whether they could have accommodated him in some other way.

[39] The court has stated that the role of Tribunals and Courts is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.²⁹

[40] The court has also said that the Tribunal does not have to determine whether the dismissal was justified or whether the penalty was justified. I have to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.³⁰ Based on the facts of this case, I have decided that the Claimant's conduct does amount to willful misconduct.

²⁸ See GD2-9 to GD2-13

²⁹ See *Canada (Attorney General) v Caul*, 2006 FCA 251.

³⁰ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

[41] The Claimant's recourse against his employer is to pursue his claims in court, or any other Tribunal that may deal with these particular matters. I note that the Claimant works in a unionized environment, but has chosen not to file a grievance because he said that his union is not supporting employees.

Conclusion

[42] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[43] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section