



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 781

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

Decision

Appellant: S. S.
Representative: L. K.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (460944) dated March 3, 2022
(issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Videoconference
Hearing date: May 12, 2022
Hearing participant: Appellant (Claimant)
Appellant's Witness

Decision date: May 31, 2022
File number: GE-22-834

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and put on a leave of absence from his job because of misconduct. This means that the Claimant is not entitled to receive Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant worked as a locomotive conductor. The employer put the Claimant on an unpaid leave of absence because he did not comply with their covid19 vaccination policy.² The Claimant then applied for EI regular benefits.³

[4] The Commission decided that the Claimant was not entitled to receive benefits because he was suspended due to his own misconduct.⁴

[5] The Claimant disagrees because the employer has subjected him to an unjust suspension, failed to accommodate his religious exemption and applied the mandatory vaccination policy in an unreasonable, arbitrary and discriminatory manner which he says is contrary to the collective agreement.⁵ He also says that his conduct does not amount to misconduct.

Matters I have to consider first

Jurisdiction + Post-hearing documents

[6] The Claimant argued that the employer did not properly consider his accommodation request for a religious exemption from the covid19 vaccination policy

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

² See record of employment at GD3-17; supplementary record of claim dated December 17, 2021 at GD3-19 and policy at GD3-56 to GD3-70.

³ See application for benefits at GD3-3 to GD3-16.

⁴ See Commission's representations at GD4-1 to GD4-12.

⁵ See appeal forms at GD2-1 to GD2-15.

and that he was unfairly put on an unpaid leave of absence. The Claimant and his Witness says that the employer did not follow the collective agreement.

[7] At the hearing, I told the Claimant that there was a Federal Court case that says I cannot decide whether the employer's penalty was appropriate. Specifically, the court said "*the role of the Board of Referees was to determine not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal, but rather whether the employee's conduct amounted to misconduct within the meaning of the Act*".⁶

[8] The Claimant responded and referenced various sections of the "*Digest of Benefit Entitlement Principles*" (Digest), primarily Chapter 6 and Chapter 7.⁷ I asked the Claimant to review the above case after the hearing and provide any written comments he might have as a post-hearing submission.

[9] After the hearing, I sent the Claimant a copy of the Federal Court case I mentioned.⁸ A copy was also sent to the Commission for their review and comment.

[10] The Claimant reviewed the case and responded by the deadline set out.⁹ He maintains that the penalty imposed by his employer is neither justified, nor a valid ground for dismissal, but submits that it is not his entire argument. The Claimant argues that his actions do not amount to misconduct within the meaning of the EI Act. He also makes other arguments in his written submissions relating to his collective agreement, referring to various sections of the Digest and to other older Federal Court cases dealing with misconduct.

[11] The Commission responded to the Claimant's written submission and argued that the Claimant was suspended from his employment because he failed to comply

⁶ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

⁷ <https://www.canada.ca/en/employment-social-development/programs/ei/ei-list/reports/digest.html>; Chapter 6 deals with voluntarily leaving employment and Chapter 7 deals with misconduct.

⁸ See GD11-1 to GD11-3.

⁹ The deadline set out was May 16, 2022.

with the employer's vaccination policy even though he was aware of the consequences.¹⁰

[12] The Commission submits that the Claimant's arguments are irrelevant on the basis of that the employer's policy is unreasonable or unfair.¹¹ They say that the Tribunal does not have the authority to decide on the vaccine efficacy or to decide if the employer acted fairly or reasonably by implementing mandatory vaccination and attestation policy. They submit that there are other avenues and proceedings for the Claimant to raise those arguments.

[13] First, I acknowledge that the Claimant does not agree with the penalty imposed by the employer, namely that he is on an unpaid leave of absence and unable to return to work. However, I find that my jurisdiction is limited to determining whether the Claimant's conduct was misconduct according to the *Employment Insurance Act* (EI Act).¹²

[14] Second, the Digest contains principles that are applied by the Commission when making they make decisions on EI claims. It is a reference tool. Digest principles are not law. This means that I not bound by the Digest principles.

[15] I am bound by the above 2002 Federal Court decision that says it is not my role to determine not whether the severity of the penalty imposed by the employer was justified or whether the employee's conduct was a valid ground for dismissal, but only whether his conduct amounts to misconduct based on the EI Act.¹³

Issues

[16] Why is the Claimant no longer working for his employer?

[17] Is it due to his own misconduct based on the *Employment Insurance Act*?

¹⁰ See GD13A-1.

¹¹ See GD14-1 to GD14-2.

¹² See *Employment Insurance Act* (S.C. 1996, c. 23).

¹³ See *Canada (Attorney General) v Marion*, 2002 FCA 185.

Analysis

[18] The parties dispute the applicable legal section in this case, so I have considered whether this case is a voluntary leave case, a period of leave without just cause, a suspension and/or misconduct.

Why did the Claimant lose his job?

This is not a “voluntary leave without just cause” case

[19] The Claimant submits that I should consider that the employer discriminated against him on a prohibited ground of discrimination based on the *Canadian Human Rights Act* because of religion. The Commission argues that this section is not applicable to the Claimant.¹⁴

[20] I agree with the Commission. There is a section in the EI Act that deals with this issue, but I find that it only applies to voluntary leaving an employment without just cause.¹⁵ The facts of this case do not support that the Claimant voluntarily left his employment, or that he had a choice to stay or leave his employment. Therefore, this section is not applicable.

This is not a “period of leave without just cause” case

[21] The Claimant referred to a Digest principle in Chapter 6¹⁶ noting that he should not be disentitled to EI benefits based on this section.

[22] There is a section in the EI Act that addresses situations for a Claimant who voluntarily takes a period of leave without just cause.¹⁷ It says that the Claimant is not entitled to receive EI benefits if the period of leave of was authorized by the employer and they agreed on the date the Claimant would resume employment.¹⁸

¹⁴ See GD14-1.

¹⁵ See section 29(c)(iii) of the EI Act.

¹⁷ See section 32 of the EI Act.

¹⁸ See section 32(1) of the EI Act.

[23] In that scenario, a Claimant who voluntarily takes a period of leave without just cause is not entitled to EI benefits until the following occurs; either they resume their employment, they lost or voluntarily leave their employment, or if at the beginning of the leave they accumulate enough hours of insurable employment with another employer to qualify for benefits.¹⁹

[24] I find that this particular section is not applicable because the Claimant did not take a voluntary period of leave. The Claimant did not have a choice because the employer will not permit him to return to work.

This is a “misconduct” case

[25] The Commission decided that the Claimant was suspended from his employment due to his own misconduct.²⁰ This is consistent with the reconsideration decision made by the Commission that confirms misconduct as the legal issue.²¹ The applicable legal section for misconduct is in the EI Act.²²

[26] To answer the question of misconduct, I have to decide two things. First, I have to determine why the Claimant is no longer working. Then, I have to determine whether the law considers that reason to be misconduct based on the EI Act.

Why is the Claimant no longer working?

[27] I find that the Claimant was suspended from his job and put on an unpaid leave from November 15, 2021. This is consistent with the employer’s letter that says he is on an unpaid leave effective from November 15, 2021.²³ It is also consistent with the record of employment (ROE) that says “dismissal or suspension” as the reason for issuing the ROE.²⁴

¹⁹ See section 32(2) of the EI Act.

²⁰ See reconsideration decision dated March 3, 2022 identifying “misconduct” as the legal issue at GD3-219; section 30(1) of the EI Act; section 31 of the EI Act and section 113 of the EI Act.

²¹ See section 112 of the EI Act and section 113 of the EI Act.

²² See section 30(1) of the EI Act.

²³ See letter dated November 16, 2021 at GD3-46.

²⁴ See ROE at GD3-17.

[28] I was not persuaded by the Claimant's argument that he was not suspended because it does not meet the employer's definitions of suspension, "held out of service" and discipline as outlined in their collective agreement.²⁵ The Claimant did not have a choice, the employer put him on a leave of absence, which I accept is akin to a suspension because he did not comply with their covid19 vaccination policy.

[29] I asked the Claimant whether he was dismissed from his employment. There is a letter dated November 30, 2021 that says if he does not comply, he would be dismissed with cause effective January 11, 2022.²⁶ The Claimant testified that he has not yet been dismissed. I note there were no termination letter in the file, or updated record of employment to show that he was dismissed on this date. Accordingly, I accept the Claimant's evidence that he has not been dismissed from his employment.

What was the employer's policy?

[30] The employer implemented a "*Mandatory covid19 Employee Vaccination Policy – Canada*".²⁷ The evidence shows that the policy was announced in August 13, 2021. Between August 2021 and November 2021, there were several communication letters issued to the employees.²⁸

[31] The policy stated that employees had to have their first dose of covid19 vaccination and upload proof to the employer by November 15, 2021 for two dose series.²⁹

[32] The second dose of covid19 vaccination had to be taken by January 10, 2022 in order to be fully vaccinated by January 24, 2022.

[33] The parties do not dispute the policy was clearly communicated to the Claimant and that he was aware of the deadlines contained within the policy.

²⁵ See collective agreement at GD9-1 to GD9-225.

²⁶ See GD3-23.

²⁷ See policy at GD3-56 to GD3-70.

²⁸ See GD3-23; GD3-46; GD3-50GD3-71; GD3-72; GD3-73; GD3-74; GD3-75 to GD3-76; and GD3-77.

²⁹ See GD3-56.

What were the consequences of not complying with the policy?

[34] The policy states that after January 24, 2022, employees who are not fully vaccinated and who have not provided proof of covid19 vaccination and not obtained an exemption based on a medical contraindications or sincerely-held religious belief will be placed on an unpaid leave and/or subject to other administrative or disciplinary measures that may be deemed appropriate in the circumstances, up to and including termination of employment.³⁰

[35] The employer sent the Claimant a letter on November 16, 2021. It says that he has not complied with their policy and has not provided a legitimate basis for his failure to comply.³¹ As a result, they put the Claimant on an unpaid leave of absence from November 15, 2021.

[36] The letter also provides an extension to obtain his first covid19 vaccination shot by November 29, 2021 and to provide proof. If not, it says that it will result in an administrative release of his employment without any further notice to him.³²

[37] The Claimant agreed that he knew his non-compliance with the policy would result in consequences such as, an unpaid leave. He acknowledged receiving all of the employer's correspondence, but expected his exemption request would have been granted.

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

[38] The policy provides for accommodations in accordance with the *Canadian Human Rights Act*³³ related to a protected ground.³⁴

³⁰ See GD3-59.

³¹ See GD3-46.

³² See GD3-46.

³³ *Canadian Human Rights Act*, R.S.C., 1985, c. H-6.

³⁴ See GD3-61.

[39] The Claimant testified that he followed all steps and submitted a request for an exemption from the policy based on his religion, but it was denied by the employer twice. A copy of the supporting documents he submitted is included in the file.³⁵

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

[40] Claimants who are suspended from their employment because of their misconduct are not entitled to receive EI benefits until their period of suspension expires, if they lose or voluntarily leave their employment, or if they accumulate enough hours with another employer after the suspension started.³⁶ Also, Claimants who lose their job because of misconduct are disqualified from receiving EI benefits.³⁷

[41] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³⁸ Misconduct also includes conduct that is so reckless that it is almost wilful.³⁹

[42] The Claimant does not have to have 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.⁴⁰

[43] 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.⁴¹

[44] The Commission has to prove that the Claimant was suspended or lost his job because of misconduct. The Commission has to prove this on a balance of probabilities.

³⁵ See GD3-26 to GD3-33; GD3-78 to GD3-92; GD3-22; GD10-2 to GD10-4 and GD10-5.

³⁶ See section 31 of the Act.

³⁷ See section 30 of the Act.

³⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³⁹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴⁰ See *Attorney General of Canada v Secours*, A-352-94.

⁴¹ 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 was suspended or lost his job because of misconduct.⁴²

[45] 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.⁴³

[46] I find that the Commission has proven that there was misconduct for the following reasons.

[47] First, I find that the Claimant willfully and consciously chose not to comply with the employer's policy once his request for exemption based on religion was denied. The employer clearly communicated the policy to him and there was sufficient time and opportunity to comply. He was given an extension to comply with the policy, even after he was put on the leave of absence.

[48] Second, the Claimant made a deliberate choice not to comply with the policy and it resulted in his suspension and unpaid leave of absence. It is clear that he cannot return to work because he has not complied with their policy. As noted above, the Claimant does not have to have wrongful intent for it to be misconduct.⁴⁴

[49] The provincial *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*

⁴² See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁴³ See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

⁴⁴ See *Attorney General of Canada v Secours*, A-352-94.

*Human Rights Code*⁴⁵ 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.⁴⁶

[50] Third, I accept that the Claimant requested an exemption from the employer's policy and asked them to accommodate him based on religion. He has provided many supporting documents to support his request and beliefs. However, his request was denied by the employer on two occasions. In my view, once the Claimant was denied the exemption, he knew that he was not exempt from the policy and it became misconduct when he chose not to comply with the policy.

[51] Fourth, the Claimant knew that by not complying with the policy it could get in the way of carrying out his duties as a conductor. This became a condition of his employment and his failure to comply with the policy led to a suspension and unpaid leave of absence. In this case, the employer says that the vaccination was a fundamental term of his employment flowing from a legal requirement.⁴⁷

[52] Lastly, I generally accept that the employer has the authority to manage their day-to-day operations, which may include the development and imposition of policies at the workplace to ensure the health and safety of employees and others. However, I also accept that the Claimant can decide whether he wants to be vaccinated and/or to disclose his vaccination status to the employer. In this case, I do not find that the employer forced the Claimant to vaccinate because he still had a choice. It was his own choice that led to undesirable outcomes such as a suspension, leave of absence, and loss of income.

[53] The purpose of the *Employment Insurance 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.⁴⁸ This is not an automatic

⁴⁵ See *Human Rights Code*, R.S.O. 1990, c. H.19.

⁴⁶ 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.

⁴⁷ See GD3-23.

⁴⁸ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

right, even if a Claimant has paid EI premiums. In my view, the Claimant was not terminated involuntarily because it was his non-compliance with the employer's policy that led his suspension and unpaid leave of absence.

[54] Based on my findings above, I find that the Claimant was suspended and put on a leave of absence because of misconduct.⁴⁹

What about the Claimant's other arguments?

[55] I understand that the Claimant disagrees with the employer's decisions around his religious accommodation, the penalty imposed and the employer's alleged failure to follow the collective agreement. However, as I mentioned above, I do not have the authority to decide on these issues. My scope is limited to misconduct according to the EI Act and I have already decided that his conduct does amount to misconduct.

[56] The Claimant testified that he has already filed a union grievance and they are currently at Step 3 of that process.⁵⁰ As well, he has other legal actions against his employer including a lawsuit and a claim filed at the *Canadian Human Rights Commission*.

[57] The Claimant's recourse is to pursue these actions in the courts, or other relevant Tribunals that may deal with these particular matters.

Conclusion

[58] 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.

[59] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

⁴⁹ See section 31 of the EI Act.

⁵⁰ See GD3-47; GD3-48 to GD3-49; GD7; GD9.