



Citation: *AR v Canada Employment Insurance Commission*, 2022 SST 903

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

Decision

Appellant (Claimant): A. R.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (462259) dated April 7, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference
Hearing date: July 28, 2022
Hearing participants: Appellant
Decision date: August 10, 2022
File number: GE-22-1424

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits from January 3, 2022, to February 28, 2022.¹

Overview

[3] The Claimant was suspended from his job at “X” on December 31, 2021. The employer said the Claimant was placed on an unpaid leave of absence for not following their Covid-19 vaccination policy that all employees had to be double vaccinated by January 1, 2022. The employer explained that the provincial vaccination mandate was lifted on March 1, 2022, and the Claimant was able to return to work.

[4] The Commission accepted the employer’s reason for the Claimant’s suspension. The Commission decided the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant was disentitled from receiving EI benefits from January 3, 2022, to February 28, 2022.

[5] The Commission says the Claimant decided not to comply with the employer’s Covid-19 vaccination policy and chose not to prevent his suspension. The Commission further says the Claimant’s actions were conscious and intentional.

[6] The Claimant says he was forced onto an unpaid leave of absence by the employer. He says there was no need to seek a medical exemption, because he made

¹ A claimant who is suspended from his employment because of his misconduct is not entitled to receive EI benefits until the claimant meets one of the provisions in Section 31 of the *Employment Insurance Act*, which are:

(a) that the period of suspension expires;
(b) that the claimant loses or voluntarily leaves the employment; or
(c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits

a personal medical decision not be vaccinated. The Claimant says he was seeking “justice” in his appeal. He further says there was medical discrimination and intolerance by the employer.

Issue

[7] Was the Claimant suspended from his job because of misconduct?

Analysis

[8] To answer the question of whether the Claimant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from his job?

[9] I find the Claimant was suspended from his job, because he didn’t comply with the employer’s mandatory Covid-19 vaccination policy. Specifically, the employer advised their employees they had to be double vaccinated by January 1, 2022.

[10] The Commission says the Claimant was suspended for not complying with the employer’s Covid-19 vaccination policy.

[11] The Claimant doesn’t dispute he was suspended (and placed on an unpaid leave) for not complying with the employer’s Covid-19 vaccination policy.

[12] I find the Claimant was suspended for not complying with the employer’s Covid-19 vaccination policy.

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

[13] The reason for the Claimant’s suspension is misconduct under the law.

[14] 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, he doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁴

[15] 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 suspended or let go because of that.⁵

[16] The Commission has to prove that the Claimant was suspended 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 was suspended from his job because of misconduct.⁶

[17] The Commission says there was misconduct because the Claimant chose not to comply with the employer's Covid-19 vaccination policy. The Commission says the Claimant's actions were conscious and intentional and taken in full knowledge they would result in a suspension or loss of employment.

[18] The Claimant says there was no misconduct because he made a personal medical decision not to be vaccinated. He further says he was forced onto an unpaid leave of absence by the employer.

[19] I find the Commission has proven there was misconduct, because the Claimant confirmed in his testimony that he was aware of the employer's vaccination policy in October 2021 and chose not to comply with the policy by January 1, 2022. In short, the Commission showed the Claimant made an intentional decision not to comply with the employer's vaccination policy even though he knew he could be suspended or even

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.

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

lose his job. I realize the Claimant testified that he was forced onto an unpaid leave by the employer. Nevertheless, the Claimant made a conscious choice not to comply with the employer's vaccination policy with the full knowledge he could be suspended or even lose his job.

Additional Testimony from the Claimant

[20] I recognize the Claimant further argued that he was subject to medical discrimination and intolerance from the employer. However, I agree with the Commission that the Claimant's argument that he was unlawfully or wrongfully suspended owing to his perceived violation of his rights was not relevant to this appeal (GD4). I further agree with the Commission that other avenues existed for the Claimant to raise these arguments.

[21] Finally, I realize the Claimant explained that confidential information was disclosed to the public when he was placed on a leave of absence from the employer. Specifically, the Claimant explained that people knew why he was placed on a leave of absence. I recognize the Claimant was frustrated and displeased with the employer's release of information on employees who were placed on a leave of absence. Nevertheless, the only issue before me is whether the Claimant was suspended from his job because of misconduct. As mentioned, I find the Commission has proven the Claimant was suspended because of misconduct. I make this finding because the Commission showed the Claimant chose not to comply with the employer's vaccination policy in full knowledge that he could be suspended or lose his job.

So, was the Claimant suspended from his job because of misconduct?

[22] Based on my findings above, I find the Claimant was suspended from his job because of misconduct.

Conclusion

[23] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits from January 3, 2022, to February 28, 2022.

[24] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section