



[TRANSLATION]

Citation: *MC v Canada Employment Insurance Commission*, 2022 SST 1061

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: M. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (478862) dated May 31, 2022
(issued by Service Canada)

Tribunal member: Josée Langlois

Type of hearing: Videoconference

Hearing date: September 22, 2022

Hearing participant: Appellant

Decision date: September 23, 2022

File number: GE-22-1978

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant temporarily stopped working because of misconduct (in other words, because he did something that caused him to lose his job). This means that he is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant is a client service case manager at X. On January 31, 2022, the employer suspended him because he refused to provide a vaccination attestation in accordance with the COVID-19 vaccination policy adopted by the employer on October 31, 2021. The Appellant has been back to work since July 18, 2022, because the employer changed its policy.

[4] The Commission accepted the employer's reason for the suspension. It decided that the Appellant temporarily stopped working because of misconduct. Because of this, the Commission disqualified the Appellant from receiving EI benefits.

[5] The Appellant disagrees with the Commission's decision. He says that he didn't commit misconduct. He admits that he refused to provide the employer with the attestation of his vaccination status, but he says that this refusal had nothing to do with his job—especially since he was working from home. He argues that he was put on leave, not suspended.

[6] I have to determine whether the Appellant was suspended because of misconduct.

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who are suspended from their job because of misconduct aren't entitled to receive Employment Insurance (EI) benefits until the end of the suspension period.

Issues

[7] Did the Appellant refuse to comply with the employer's vaccination policy?

[8] If so, does this act amount to misconduct?

Analysis

[9] I note that the possibility of getting benefits in the case of misconduct is assessed in the same way for a period of suspension or a dismissal.

[10] To answer the question of whether the Appellant temporarily stopped working because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the *Employment Insurance Act* (Act) considers that reason to be misconduct.

Did the Appellant refuse to comply with the employer's vaccination policy?

[11] I find that the Appellant was suspended from his job because he refused to comply with the employer's vaccination policy. According to this policy, the Appellant had to provide the employer with proof of COVID-19 vaccination by January 31, 2021, and he refused to do so.

[12] When the Appellant applied for benefits, he indicated that he was suspended because he refused to comply with the employer's vaccination policy.

[13] The Commission and the Appellant agree on the reason why the Appellant stopped working.

[14] The employer indicated on the Record of Employment that the Appellant had stopped working because of suspension and/or dismissal. A manager at the employer told the Commission that the Appellant was suspended on January 31, 2021, because he refused to provide proof of COVID-19 vaccination in accordance with the employer's

vaccination policy. The manager explained that the attestation of proof of COVID-19 vaccination was a requirement to continue working.

[15] The Appellant admits to refusing to comply with the employer's policy requiring him to show proof of COVID-19 vaccination. I find that he acted as the employer says he did.

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

[16] A worker who is suspended because of misconduct isn't entitled to receive EI benefits until the end of the suspension period.²

[17] The reason for the Appellant's suspension is misconduct under the Act. A worker who is suspended because of misconduct can't receive EI benefits.

[18] To be considered misconducted under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ The Appellant 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 Act.⁵

[19] There is misconduct if the Appellant 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.⁶

[20] The Commission has to prove that the Appellant stopped working because of misconduct. The Commission has to prove this on a balance of probabilities. This

² See section 31 of the Act.

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

means that it has to show that it is more likely than not that the Appellant was suspended because of misconduct.⁷

[21] On September 1, 2021, the employer, X, told all employees that the company was adopting a mandatory vaccination policy: [translation] *X COVID-19 Vaccination Policy*.⁸ According to this policy, the employer required all employees to be vaccinated against COVID-19 and to provide proof of vaccination by October 31, 2021. The employer then said that any breach of this rule could result in corrective, disciplinary, or administrative measures that could go as far as dismissal.⁹

[22] The employer says that it allowed a temporary accommodation for unvaccinated employees. These employees were able to do rapid tests for COVID-19. However, on December 2, 2021, the employer told employees that this accommodation would no longer be possible as of February 1, 2022. All employees must have submitted their COVID-19 vaccination attestation by then.

[23] The Appellant admits that he knew about the employer's vaccination policy from September 1, 2021. He says that he got an extension to submit the attestation of his vaccination status. He says that he didn't provide proof of his vaccination on October 31, 2021, but that he continued working until January 31, 2021 [*sic*], because of an accommodation during that period that allowed him to do rapid tests for COVID-19. But this accommodation ended January 31, 2022, and the employer told him that measures would be taken concerning unvaccinated employees. The Appellant was also told that, on May 1, 2022, unvaccinated employees would be dismissed.¹⁰

[24] The Appellant refused to provide the employer with a vaccination attestation, and he was suspended on January 31, 2022. He still hadn't provided the attestation of his vaccination status on May 1, 2022, but he wasn't dismissed. The employer gave him

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁸ GD3-16 to GD3-20.

⁹ GD3-15 and GD3-16.

¹⁰ GD3-21.

another extension to provide the COVID-19 vaccination attestation, and then it changed its policy. The Appellant has been back to work since July 18, 2022.

[25] The Appellant explains that, in his sector, only 26 employees aren't vaccinated and that the employer could have accommodated them. He says that the employer's policy is discriminatory and that the government approach the company relied on didn't require X to impose COVID-19 vaccination to continue working. The Appellant argues that he was working from home from the beginning of the pandemic and that he wasn't in contact with other employees. He met with them virtually. He says that he filed a grievance with his union.

[26] The Appellant says that it is his right to not want to provide an attestation of his vaccination status, since that information is private. At the hearing, he said that he preferred natural medicine and that there were alternatives to curing COVID-19 other than receiving the vaccine.

[27] He also says that he was afraid of getting the COVID-19 vaccine. He was afraid he would die if he got it. He argues that there was a risk of developing a heart condition or disease from the vaccine, such as myocarditis. He says that he knew people who received three doses of the COVID-19 vaccine who still got the virus and that some of them were even hospitalized.¹¹ In this sense, he explains that the vaccine's efficacy isn't proven.

[28] At the hearing, the Appellant indicated that the employer abused its power in requiring him to provide a COVID-19 vaccination attestation. For this reason, he argues that the Commission's decision is arbitrary because he, in no way, violated the employer's code of conduct. He says that his performance at work was satisfactory and that he got a promotion in October 2021.

[29] The Commission argues that the Appellant knew that not following the employer's vaccination policy could result in suspension. He also knew that, to go back

¹¹ GD3-22.

to his position, he had to comply with the vaccination policy, but he refused to do so. The Commission says that there is a link between the Appellant's suspension and his refusal to comply with the COVID-19 vaccination policy and that this refusal amounts to misconduct under the Act.

[30] In addition, the Commission says that it isn't a question of authorized leave within the meaning of section 32 of the Act because this leave wasn't voluntary, but a leave without pay imposed by the employer.

[31] I agree with the Commission. While I understand the Appellant's explanations and reasons for refusing to provide the employer with an attestation of his vaccination status, when an employee voluntarily refuses to follow an employer policy, this behaviour prevents them from fulfilling their duties toward their employer.

[32] I am of the view that, in refusing to comply with the employer's policy, the Appellant could assume that being suspended from his duties was a possibility. In addition, the information given to employees, as well as the policy itself—in force since October 31, 2021, clearly indicates that there will be consequences for those who don't provide a COVID-19 vaccination attestation. Those consequences could go as far as dismissal.

[33] The employer agreed to assess an exemption for medical reasons if an employee provided a signed doctor's note. But the Appellant didn't provide such a medical exemption.

[34] I heard the Appellant's reasons for refusing to provide an attestation of his vaccination status. But to decide whether the Appellant's refusal amounts to misconduct under the Act, I don't have to determine whether the suspension was an appropriate measure, but whether the Appellant's acts amount to misconduct.

[35] The Appellant knew that the employer had adopted a COVID-19 vaccination policy, and he knew that he had to provide proof of vaccination to continue working. Even though he was working from home, a manager at the employer explained that

employees' return to the office was expected for February 2022. Without a vaccine exemption, the Appellant voluntarily decided not to comply with the COVID-19 vaccination policy. According to the employer's policy, he could not continue working.

[36] Even though the Appellant argues that it isn't a question of misconduct, but of being put on leave, within the meaning of the Act, this leave without pay imposed by the employer meets the definition of a suspension period.

[37] To find misconduct during a suspension period, there doesn't have to be wrongful intent. In other words, I don't have to determine whether the Appellant did something wrong. I understand the Appellant's explanations, and I am sure he didn't want to do anything wrong. For various reasons, the Appellant didn't want to get vaccinated and/or provide his employer with an attestation of his vaccination status.

[38] The Appellant was suspended by his employer because he didn't follow its rules; he refused to comply with the mandatory vaccination policy for all employees (unless he could provide a medical or religious exemption). By refusing to comply with it, the Appellant didn't follow the employer's rules.

[39] The Appellant admits to receiving the clear guidelines from the employer about the vaccination policy. He refused to provide proof of vaccination like the policy required, and he could no longer continue working. The Appellant knew the rules, and he decided not to comply with them. This voluntary act amounts to misconduct.

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

[40] The Appellant can't get regular benefits if he is suspended or dismissed for committing misconduct. When an employee doesn't follow their employer's rules, they can assume that they will be suspended or dismissed.

[41] As mentioned, I don't have to determine whether the suspension was an appropriate measure. I note, however, that the possibility of getting benefits is assessed in the same way for a suspension period or after a dismissal.

[42] Based on my findings above, I find that it is more likely than not that the Appellant temporarily stopped working because of misconduct. The Appellant acted as the employer says he did, and refusing to comply with the employer's policy amounts to misconduct under the Act.

Conclusion

[43] The Commission has proven that the Appellant temporarily stopped working because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[44] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section