



Citation: *MF v Canada Employment Insurance Commission*. 2022 SST 1100

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

Decision

Appellant: M. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (458622) dated March 4, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Teleconference

Hearing date: August 11, 2022

Hearing participant: Appellant

Decision date: August 29, 2022

File number: GE-22-1586

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 from his job because of misconduct (in other words, because he did something that caused him to be suspended from his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was placed on an unpaid leave of absence from his job. The Claimant's employer said that he was placed on a leave of absence because he didn't comply with their COVID-19 vaccination policy.

[4] The Claimant doesn't dispute that this happened. But, he says that his employer placed him on involuntary leave without pay which is the same as a lay-off, so he should be entitled to EI benefits.

[5] The Commission accepted the employer's reason for the unpaid leave of absence. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

Matter I have to consider first

The Claimant didn't file the Commission's reconsideration decision

[6] The Claimant has to send the Tribunal a copy of the Commission's decision with his notice of appeal.² He did not do so. I have a copy of the Commission's file that has this decision. So, I do not need the Claimant to send it.³

¹ Section 31 of the *Employment Insurance Act* (Act) says that a claimant who is suspended from their job because of misconduct is disentitled from receiving benefits.

² See section 24(1)(b) of the *Social Security Regulations*.

³ See section 3(1)(b) of the *Social Security Regulations*.

Issues

[7] Did the Claimant voluntarily take leave, was he suspended from his job, or was he laid off?

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

Analysis

Did the Claimant voluntarily take leave, was he suspended from his job, or was he laid off?

[9] The Claimant was suspended from his job.

[10] The law deals with dismissal for misconduct and voluntarily leaving without just cause together.⁴ This is because both refer to actions a claimant has taken that result in the loss of employment.⁵ The legal issue at stake for both is disqualification from receiving EI benefits.

[11] Sometimes it isn't clear if a claimant is unemployed because they were dismissed or because they voluntarily left their job. In cases like those, since the legal issue at stake for both is the same in the law, based on the evidence, the Tribunal can decide the grounds for disqualification.⁶

[12] In this case, the Claimant's employer issued a record of employment (ROE) that says the reason for issuing it is a leave of absence. But, the Commission notified the Claimant that it couldn't pay him EI benefits because he was suspended from his job because of his misconduct.

[13] The Claimant first told the Commission that he was suspended without pay. He says he doesn't know why the ROE shows leave of absence. He sent the Commission a copy of an email he sent to his employer. In it, he says that he did not agree to a

⁴ See section 30 of the Act.

⁵ This reasoning appears in two Federal court of Appeal decisions. See *Canada (Attorney General) v Easson*, A-1598-92; *Canada (Attorney General) v Desson*, 2004 FCA 303.

⁶ See *Canada (Attorney General) v Borden*, 2004 FCA 176.

leave of absence, and he has been suspended. He asked the employer to correct the ROE.

[14] In his notice of appeal, the Claimant suggested that his employer laid him off. He referred to the section 32 of the Act. It concerns voluntarily taking a period of leave without just cause, where the employer authorizes the leave and the claimant and employer agree to a date when the claimant will resume working.

[15] The Claimant also referred to section 6.6.2 of the Commission's Digest of Benefit Entitlement Principles. It says if an employer imposes a leave of absence, then it is considered a lay-off. The Claimant argues that if he's considered to be laid off, that's not a suspension and he's entitled to EI benefits.

[16] I don't agree with the Claimant's argument that he should be considered laid off. His employer said on his ROE that they issued it because of a leave of absence. But the Claimant doesn't say, for example, that there was a shortage of work at his place of employment. Instead, he agrees that he was placed on an unpaid leave of absence because he didn't do something his employer asked him to do; he didn't take the COVID-19 vaccine.

[17] The Claimant's initial statements show he understood that he was suspended from his job. I find that he chose not to do something his employer asked him to do. This led the employer to place him on the leave of absence. I find this is different from the employer imposing a leave of absence on the Claimant in an arbitrary way. I don't find that section 32 of the Act or section 6.2.2 of the Commission's Digest of Benefit Entitlement Principles apply.

[18] I find that the question of whether a claimant has voluntarily taken a leave from a job or if their employer has suspended them from their job is like the question of voluntarily leaving without just cause versus dismissal. The difference in the two questions is that the issue at stake in the first is disentitlement. As noted above, the issue at stake in the second is disqualification.

[19] In this case, I find that the Claimant's employer placed the Claimant on an unpaid leave of absence. They didn't do so because he asked for leave, but because of an action he took. So, I don't find that the Claimant voluntarily took leave from his job; rather, I find the Claimant's employer suspended him from his job.

Was the Claimant suspended from his job because of misconduct?

[20] 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?

[21] I find that the Claimant was suspended from his job because he didn't comply with his employer's COVID-19 vaccination policy.

[22] The Claimant and the Commission agree on why the Claimant was suspended from his job. The employer gave the Commission general information about the reason for separation of employees through an information bulletin dated October 31, 2021. It says employees were placed on leave without pay because they didn't comply with their COVID-19 vaccination policy.

[23] The Claimant told the Commission that his employer placed him on an unpaid suspension as of October 31, 2021 because he didn't let them know his vaccination status. He confirmed at the hearing that he was placed on an involuntary leave of absence on this date.

[24] I find that the Claimant was suspended because he didn't let his employer know his COVID-19 vaccination status. I accept his evidence as fact and find that he didn't comply with the employer's COVID-19 vaccination policy.

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

[25] The reason for the Claimant's suspension is misconduct under the law.

[26] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸ 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.⁹

[27] 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 because of that.¹⁰

[28] The Commission has to prove that the Claimant was suspended from his job because of misconduct. It 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.¹¹

[29] It is not my role to determine if dismissal (or in this case suspension) by the employer was justified or was the appropriate sanction. It's my role to determine if the Claimant's action is misconduct under the law.¹²

[30] The Commission says that there was misconduct because the Claimant failed to comply with the employer's mandatory COVID-19 vaccination policy. It concludes this because the Claimant was aware of the policy, understood it, and knew that he could lose his job, but he chose not to comply.

[31] The Claimant says he stopped working because he didn't have proof of vaccination. He says he sent a notice of liability to his employer about its COVID-19 vaccination policy. He argues that because his employer didn't respond to this notice within 14 days, he is exempt from having to comply with the employer's policy.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹² See *Canada (Attorney General) v Caul*, 2006 FCA 251.

[32] I find that the Commission has proven that there was misconduct, because the Claimant didn't comply with his employer's COVID-19 vaccination policy. I don't find that the Notice of Liability Regarding Medical Procedure (notice) exempts the Claimant from complying with the policy.

[33] The Commission included a copy of the employer's COVID-19 vaccination policy in its reconsideration file. The employer's information bulletin states the policy was communicated to employees on August 25, 2021. After that, two emails were sent to those who hadn't provided their vaccination status. The second email said employees that didn't provide their vaccination status by October 31, 2021, would be placed on unpaid leave.

[34] I asked the Claimant about details in the COVID-19 vaccination policy. He confirmed his employer sent it out by email. He also confirmed he was aware that employees were required to get fully vaccinated, to report their vaccination status and to document proof of vaccination in the employer's reporting tool.

[35] The Claimant testified that his contract with his employer didn't include a vaccination policy. He said that after they introduced the policy, he wanted to get more information about the vaccine. He said he sent an email to the employer, but they ignored it. He added the employer just sent generic emails dismissing everything he asked.

[36] I can understand that the Claimant had questions about the COVID-19 vaccine since it was new. But I find that he knew about his employer's policy and what he faced if he didn't follow the policy.

[37] The employer's policy allows for accommodation based on medical, religious or other prohibited grounds of discrimination that prevent employees from taking the vaccine. Other than the notice the Claimant sent to the Commission, he did not say that he asked his employer to accommodate him in a way described above. So, I find that he chose not to take the COVID-19 vaccine for personal reasons.

[38] I asked the Claimant about the notice he sent his employer. The Claimant told the Commission that the notice required them to get back to him in 14 days or they could not suspend him. He points to a section in the notice that says failure to reply “conveys [the employer’s] agreement with all the terms and provisions of the contract”.

[39] I asked the Claimant to explain what his employer had agreed to by not responding to the notice. The Claimant read from a section titled “Agreement and Waiver of Rights”. He said that by not replying to the notice, the employer waived the COVID-19 vaccination policy.

[40] The Claimant explained that if his employer had responded to the notice by saying they were liable if anything happened to him, then he would have had to comply with the policy. Since his employer didn’t respond, he questioned who would be responsible if something happened to him if he took the COVID-19 vaccine.

[41] The Claimant told the Commission that he didn’t contact a lawyer about the notice. He said that he wrote to his employer with the notice on his own. I asked him about this. The Claimant testified that the notice was a template that was given to him. He added that a law professor was helping some of the employees where he worked.

[42] I am not persuaded that the notice of liability means the Claimant is exempt from his employer’s COVID-19 policy. Even though the notice is notarized, I don’t find it reasonable to conclude that the employer agrees and is bound by the notice just because they didn’t reply. The Claimant acknowledged that he’s not sure about the law since he’s not a legal professional. And since he says he used a template to write the notice, I don’t give it much weight.

[43] I find that the Claimant’s action, namely not complying with his employer’s COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to take the vaccine. He did so knowing that he would be placed on an unpaid leave absence. I have found that this means that he was suspended. For this reason, I find that the Commission has proven that there was misconduct.

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

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

Conclusion

[45] 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.

[46] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section