



Citation: *CA v Canada Employment Insurance Commission, 2022 SST 1404*

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

Decision

Appellant: C. A.
Representative: C. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (467886) dated May 4, 2022
(issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Teleconference

Hearing date: September 27, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: October 3, 2022

File number: GE-22-1763

Decision

[1] The appeal is dismissed, with modification to the end date of the disentitlement.

[2] The Canada Employment Insurance Commission (Commission) has proven the Claimant was suspended from his job because of misconduct. In other words, because he did something that caused him to lose his job.

[3] The Claimant returned to work July 11, 2022. This means he is disentitled from receiving Employment Insurance (EI) benefits from November 15, 2021, to July 8, 2022.

Overview

[4] The Claimant stopped working on November 14, 2021. He applied for EI benefits. The Commission looked at the Claimant's reasons why he was no longer working. It decided that he was suspended from his job because of misconduct so it wasn't able to pay him benefits.¹

[5] The Claimant's employer told the Commission they placed the Claimant on an unpaid leave of absence from his job because he refused to comply with the employer's vaccination policy. This leave of absence was initially for a definite period to January 11, 2022, at which time the Claimant would be dismissed if he didn't agree to follow the vaccination policy. The employer deferred the Claimant's dismissal.\

[6] The employer learned of legal proceedings challenging the Ministerial Order requiring vaccinations in the Claimant's workplace. They allowed the Claimant to return to work starting July 11, 2022.

[7] The Commission reviewed the employer's reason for placing the Claimant on an unpaid leave of absence. It decided the employer suspended the Claimant because of misconduct. So it disentitled the Claimant from receiving EI benefits.

[8] The Claimant appeals to the Social Security Tribunal (Tribunal). He disputes that he was suspended. Instead, he says he was placed on an unpaid leave of absence for

¹ See the initial decision letter at page GD3-58.

failing to show he was vaccinated against COVID-19. He says he is Indigenous and believes in natural ways, not vaccines. He has a right to live and to equality. He says he followed the bylaws, collective bargaining agreement, and the employer's COVID policy by asking for a religious exemption. He also says the employer's policy violates privacy acts and is public incitement of hatred.

Matter I must consider first

The employer is not an added party

[9] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer didn't reply.

[10] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Issue

[11] Was the Claimant on a leave of absence or suspended?

[12] If suspended, was the suspension because of misconduct?

Analysis

Leave of absence or suspension

[13] I find the Claimant's circumstances are a suspension for the reasons I've set out below.

[14] In the context of the *Employment Insurance Act* (EI Act), a leave of absence or voluntary period of leave requires the agreement of the employer and a claimant. It must also have an end date that is agreed between the claimant and the employer.²

[15] The Claimant says he didn't agree to take a period of unpaid leave from his employment beginning November 15, 2021.³ Instead, he says his employer placed him on unpaid leave because he preferred not to disclose his vaccination status. He asked for religious exemption but the employer denied his request.

[16] The Claimant asserts the employer erred when issuing the Record of Employment (ROE) listing the reason as "M" for dismissal. His employer never told him they were dismissing or terminating him. He says the ROE should be corrected to show "N" for leave of absence.

[17] The law says there is no mechanism by which the Social Security Tribunal can compel the employer to change the ROE.⁴ So even if I determined the ROE listed an incorrect reason for separation, which I don't, I don't have jurisdiction to order the employer or the Commission to change the ROE.

[18] The section of the law for disentitlement due to a suspension speaks to a claimant's actions leading to their unemployment. It says a claimant who is suspended from their job due to their misconduct is not entitled to benefits.⁵

[19] The evidence shows it was the Claimant's conduct of refusing to comply with the employer's vaccination policy, which led to him not working. So I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances can be considered a suspension.

² See section 32 of the EI Act.

³ The Record of Employment (ROE) at page GD3-21 lists the Claimant's last day paid was November 14, 2021.

⁴ See *HNV vs Canada (Attorney General)*, 2021 FCA 221.

⁵ See section 31 of the EI Act.

Suspension because of misconduct

[20] To determine whether the employer suspended the Claimant because of misconduct, I must decide two things. First, I must 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 the employer suspended the Claimant because he failed to comply with the employer's COVID-19 vaccination policy. The Claimant agrees the employer stopped him from working as of November 14, 2021, for that reason.

[22] The employer told the Commission the Claimant was placed on a leave of absence because he chose not to disclose his vaccination status, as required by the employer's vaccination policy. The Claimant was put on a leave of absence without pay for an indefinite period.

[23] The evidence shows the Claimant was aware of the vaccination policy. Specifically, the documents on file show he submitted a request for religious exemption from that policy.⁶ At the hearing, the Claimant provided contradictory testimony. First, he said he wasn't fully aware of the policy. Then he explained in detail how he couldn't enter work because he preferred not to disclose his vaccination status, as required by the policy. He also explained how his employer denied his request for religious exemption from the policy. The Claimant says he remained in contact with his union, for updates on any changes to the policy.

[24] On November 16, 2021, the employer informed the Claimant in writing that he had not complied with the employer's vaccination policy. He also failed to provide the employer with any legitimate basis for his failure to comply so he was placed on an unpaid leave effective November 15, 2021.⁷

⁶ See page GD3-49.

⁷ See page GD3-50.

[25] On November 30, 2021, the employer wrote to the Claimant stating he would be dismissed effective January 11, 2022, if he didn't provide proof of vaccination by January 10, 2022.⁸ On January 10, 2022, the employer wrote another letter to the Claimant stating he remains on an unpaid leave pending the outcome of a recent legal proceeding challenging the Ministerial Order requiring all employees in their industry to be vaccinated.⁹

[26] The Claimant argues he didn't receive any letters emailed to him from the employer after November 14, 2021. This is because he didn't have access to his work email until he returned to work on July 11, 2022. Upon further clarification, the Claimant says he was aware of what was going on with his employment status after November 14, 2021, through continued communications with his union.

[27] The Commission refused to pay the Claimant EI benefits because he was suspended from his job due to his misconduct. It imposed an indefinite disentitlement effective November 15, 2021. The Commission maintained its decision upon reconsideration.

[28] Based on the forgoing, I find the employer suspended the Claimant because he failed to comply with the employer's COVID-19 vaccination policy.

– **Is the reason for suspension misconduct under the law?**

[29] Yes. I find the reason for the Claimant's suspension is misconduct under the law. My reasons are set out below.

[30] To be misconduct under the law, the conduct has to be wilful. This means that it was conscious, deliberate, or intentional. It also includes conduct that is so reckless that it is almost wilful.¹⁰ The Claimant doesn't have to have wrongful intent (in other words,

⁸ See page GD3-51.

⁹ See page GD3-52.

¹⁰ See *McKay-Eden v. Her Majesty the Queen*, A-402-96

the Claimant doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.¹¹

[31] 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 there was a real possibility of being let go because of that.¹²

[32] The Commission says there was misconduct because the Claimant knew he had to adhere to the employer's COVID-19 vaccination policy to continue working. The policy requires him to disclose his vaccination status and receive at least one dose of a COVID-19 vaccine by November 15, 2021, if not granted an exemption. The employer denied his request for religious exemption and he intentionally refused to disclose his vaccination status. This refusal was wilful and the direct cause of his suspension.

[33] The Claimant contradicted himself. First he said he wasn't fully aware of the employer's policy but then said he complied with the policy. I recognize the Claimant submitted a request for a religious exemption but the employer denied his request. The Claimant admits that he was aware that by refusing to disclose his vaccination status, he wasn't complying with the employer's policy.

[34] The Claimant argues he was willing and able to work. He was agreeable to work and undergo PCR testing. But he knew the employer's policy required him to update his vaccination status by September 24, 2021.

[35] I find the Claimant knew that his refusal to comply with the policy could lead to being placed on an unpaid leave of absence (suspension) and an eventual dismissal. This is wilful, conscious and deliberate and meets the legal notion of misconduct as outlined in subsection 30(1) of the EI Act.

¹¹ See *Attorney General of Canada v. Secours*, A-352-94.

¹² See *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.

[36] As explained during the hearing, it is not my role to determine if the employer's policy or actions were reasonable or a violation of the Claimant's privacy rights.¹³ I don't have the authority to make decisions about whether the employer should have granted the Claimant any accommodations or whether their refusal to do so was discriminatory. The Claimant may make those claims and allegations to another tribunal who may decide them.

[37] It is also not my role to determine whether the employer wrongfully or constructively dismissed the Claimant as that term relates to Canadian employment law and common law. The test for "with cause" as used in those proceedings, and in arbitration, is different from the legal test applied when deciding whether misconduct has occurred, within the meaning of the EI Act.¹⁴

[38] Further, I can't determine issues relating to non-compliance with a collective agreement. The Claimant says his collective agreement required his employer to conduct a formal investigation before disciplining him, which they didn't do. The employer's compliance with a collective agreement must be arbitrated under the terms of that agreement and is not relevant to the Claimant's eligibility for EI benefits.

[39] The Claimant's representative said it was unreasonable to expect the Claimant to comply with the with employer's policy in such a short period. He asserts the policy came out November 13, 2021, and was effective by November 15, 2021. I disagree because the documents on file show there were seven communications emailed to employees between August 2021 and November 2021, speaking about the government mandates and the condition of employment requiring all employees to be vaccinated.¹⁵

[40] The employer told the Commission that an email was sent to employees in October 2021, stating anyone who hadn't provided their vaccination status risked being placed on unpaid leave as of November 1, 2021. The employer also wrote to the

¹³ The courts have said that in cases for a disqualification from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's act or omission and the conduct of the employer is not a relevant consideration. See *Paradis vs Canada (Attorney General)*, 2016 FC 1282.

¹⁴ See sections 29 and 30 of the EI Act.

¹⁵ See pages GD3-25 to GD3-52.

Claimant about the ministerial order issued October 29, 2021, requiring all federal regulated railway employees to be vaccinated.

[41] After consideration of the totality of the evidence before me, I find the Commission has shown the Claimant was suspended from his job because of misconduct. He was made aware of the ministerial vaccination order and the employer's vaccination policy. He was given time to comply. When he failed to do so, the employer suspended him.

[42] While I sympathize with the Claimant circumstances, I must apply the law as it stands.¹⁶ Based on my findings outlined above, I find the employer suspended the Claimant from his job because of his own misconduct. This means the Claimant is disentitled from receiving EI benefits during the period of suspension.

[43] The Claimant says he returned to work on July 11, 2022. This means the Claimant is disentitled from receiving EI benefits from November 15, 2021, to July 8, 2022.

Conclusion

[44] The period of disentitlement is from November 15, 2021, to July 8, 2022. This means the appeal is dismissed with modification.

Linda Bell

Member, General Division – Employment Insurance Section

¹⁶ See *Canada (Attorney General) v Knee*, 2011 FCA 301.