



Citation: *AD v Canada Employment Insurance Commission*, 2022 SST 1595

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

Decision

Appellant: A. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (476110) dated May 27, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Teleconference

Hearing date: November 1, 2022

Hearing participant: Appellant

Decision date: November 16, 2022

File number: GE-22-2134

Decision

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

[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). This means that the Claimant is disentitled from receiving employment insurance (EI) benefits.²

Overview

[3] The Claimant was employed by a firm that had a contract to provide services to another organization. I will call the other organization the client. The Claimant had been working from home but the client required that services be provided from its building. Everyone entering the client's building had to have a COVID-19 vaccine passport showing they were vaccinated for COVID-19. The Claimant told his employer he could not get a vaccine passport because he would not get vaccinated. He also told his employer he would not be getting a passport. The Claimant's employer placed him on a leave of absence on December 16, 2021 because he was not vaccinated, which meant he could not get a vaccine passport.

[4] The Commission accepted the employer's reason for the suspension. It 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.

[5] The Claimant does not agree with the Commission. The Claimant says he did not commit misconduct. He says that he was negotiating with his employer to continue working from home. His employer stopped negotiating with him and told him to return their equipment. The Claimant said his employer did not tell him he would be suspended if he did not have a vaccine passport.

¹ In this decision the Appellant is called the Claimant and the Respondent is called the Commission.

² Section 31 of the *Employment Insurance Act* (EI Act) says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits until the period of the suspension expires; the claimant loses or voluntarily leaves the employment; or, the claimant works enough hours of insurable employment in another employment to qualify to receive EI benefits.

Matters I have to consider first

The employer is not an added party to the appeal

[6] Sometimes the Tribunal sends a 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 did not reply to the letter.

[7] 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.

The Claimant was not on a leave of absence

[8] In the context of the EI Act, a voluntary period of leave requires the agreement of the employer and a claimant. It also must have an end date that is agreed between the claimant and the employer.³

[9] In the Claimant's case, his employer initiated the leave of absence.

[10] There is no evidence in the appeal file to show the Claimant requested or agreed to taking a period of leave from his employment.

[11] The section of the EI Act on 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.⁴

[12] As found below, the evidence shows it was the Claimant's conduct, of refusing to comply with the vaccine passport requirement that led to him not working. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances can be considered as a suspension.

³ Section 32, EI Act

⁴ Section 31, EI Act

Issue

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

Analysis

[14] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.⁵

[15] Specifically, section 31 of the EI Act says that a claimant who is suspended from their employment because of their misconduct is not entitled to receive benefits until

(a) the period of suspension expires;

(b) the claimant loses or voluntarily leaves their employment; or,

(c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under section 7 or 7.1 to qualify to receive benefits.

[16] 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. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from his job?

[17] I find the Claimant was suspended from his job because he refused to get a vaccine passport.

[18] The Claimant testified he was employed by a company that provided services under contract to another organization. He was able to work from home and then for a time he returned to work in an office belonging to the client. The Claimant said his employer told him the client wanted to move the work to another building. He was told

⁵ See sections 30 and 31 of the Act.

that to enter the new building he would have to show a vaccine passport. A vaccine passport shows that its holder has been vaccinated for COVID-19.

[19] The Claimant told his employer he did not have a passport nor intent to get one. His employer replied that he would not be permitted to work in the new building unless proof of double vaccination is provided or if an exemption form was completed and approved by the client.

[20] A representative of the employer spoke to a Service Canada officer on March 17, 2022. The representative stated its client had a vaccine mandate that the employer had to follow. The client required that the Claimant work at the new worksite. It was a requirement of the new worksite that the Claimant be vaccinated. She said the Claimant was placed on an unpaid leave of absence initiated by the employer because he was not vaccinated.

[21] The evidence tells me the Claimant suspended from his job when he failed to obtain a vaccine passport, or to have an approved exemption, as required by his employer and its client.

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

[22] Yes, I find the reason for the Claimant's suspension is misconduct under the law. My reasons for this finding follow.

[23] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's suspension is misconduct under the EI Act. It sets out the legal test for misconduct. A legal test is the questions and criteria that I consider when deciding whether misconduct has occurred.

[24] Case law says that to be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also

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

includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

[25] There is misconduct if the Claimant knew or should have known 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.⁹

[26] The courts have said that misconduct includes a breach of an express or implied duty resulting from the contract of employment.¹⁰ A deliberate violation of the employer's policy is considered to be misconduct.¹¹

[27] The law doesn't say I have to consider how the employer behaved.¹² Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.¹³

[28] I have to focus on the EI Act only. I can't make any decisions about whether the Claimant has other options under other laws or his collective agreement. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹⁴ I can consider and decide only one thing: is what the Claimant did or failed to do misconduct under the EI Act?

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

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *Canada (Attorney General) v. Brissette*, 1993 CanLII 3030 (FCA) and *Canada (AG) v Lemire*, 2010 FCA 314

¹¹ See *Attorney General of Canada v. Secours*, A-352-94; see also *Canada (Attorney General) v Bellavance*, 2005 FCA 87 and *Canada (Attorney General) v Gagnon*, 2002 FCA 460

¹² See section 30 of the Act.

¹³ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

This means it has to show it is more likely than not the Claimant was suspended from his job because of misconduct.¹⁵

[30] The Commission says it concluded the Claimant's refusal to comply with the company policy constituted misconduct within the meaning of the EI Act because the Claimant was aware of the requirement to comply with the policy or face consequences. It says the Claimant chose not to comply. Consequently, the Commission submits, the Claimant is not entitled to EI benefits for the period from December 20, 2021 because the Claimant's misconduct led to his suspension.

[31] The Commission says the Claimant was made aware of the policy, the deadlines relating to the policy, and the consequences of failing to comply with the policy. It says the Claimant chose non-compliance and this choice was wilful, conscious and deliberate. The Commission submits there is a clear causal link between the Claimant's misconduct and the Claimant's dismissal (*sic*).

[32] The Claimant testified he was employed on a contract to provide IT services for a client of his employer. The work was located in a building but he had been working from home. The client decided to move the work to another building and also wanted the Claimant to do his work in the new building. The Claimant testified the move to the new building was made known to him in September 2021. There were no passport requirements at the new building when he was told about moving to the new building. The move was done by groups of employees. He was in a group scheduled to move to the new building the week before December 16, 2021.

[33] The Claimant testified he found out about the vaccine passport requirement by email. It was mostly by a copy of emails the client sent to its employees. He was not an employee of the client and was surprised copies of the client's policy were sent to him and other employees. He said he asked why the client's policy was sent directly to "us." Then, he said, his employer came up with its own policy which was to follow the

¹⁵ See *Minister of Employment and Immigration v Bartone*, A-369-88.

client's policy which was a vaccine passport was required to enter the building where he was expected to work.

[34] The Claimant said that he did not ask for an exemption to the policy because his colleagues' requests had been rejected.

[35] The Claimant explained that to do his work he uses a computer work station. The workstation would be located in the new building. The new building required anyone who entered to show a vaccine passport. The Claimant said because he did not have a vaccine passport he could not get access to his work station in the new building. The Claimant said that he could work from home until the vaccine mandate was lifted but he could not be accommodated by his employer.

[36] The appeal file has an email dated December 1, 2021 to the Claimant from "DA." In the email DA says "pls be advised the [new building] Security team check for everyone's proof of vaccination – if no proof is shown to security, they won't let you in." The Claimant replied to this email on December 7, 2021 that his health was improving and he would soon be able to go to the new building. He wrote "I do not have a passport, nor intent to get one. It (*sic*) there a workaround solution?" The Claimant testified that the "workaround" would be him working from home. The Claimant testified he wanted to stay working from home until the vaccine mandate was lifted. DA replied on December 7, 2020:

"Hi [Claimant] – unfortunately you are not permitted to work at [new building] unless proof of double vaccination is provided ... or ... if an exemption form is completed and approved by [the client]. I do not believe you were issued an exemption form. Thus, I will see if "L" can send you the info for exemption."

[37] The Claimant testified he was trying to find a workaround but his employer stopped negotiating with him on December 16, 2021. On that date he got an email saying he was to bring his computer to the old building since he was not allowed into the new building.

[38] The Claimant argued that he and his employer were trying to accommodate the new policy. It was interpreted as misconduct. He would not say that he refused to work. He said he always wanted to perform his work for his employer working from home until the mandate was lifted. The Claimant said his actions were not wilful, he was not stubborn and did not disrupt his work performance. He said he continued to do his work and hoped the employer would reconsider. The Claimant argued the contract he signed with the employer did not say that had to have a vaccine. He had been accommodated by his employer but his employer ceased to cooperate with him.

[39] The Claimant argued that the emails he received from his employer about going to work in the new building do not say the word suspension. He says the emails do not say he will be suspended if "I don't show up." He says his employer could have continued to allow him to work from home.

[40] The Claimant argued that he has shown his actions were not misconduct on his part. He said that he tried to come to a consensus to work from home. He never received a direct email to say he would be suspended if he did not show up to work. He said he was told that for him to keep working he had to have a vaccine passport.

[41] I find the Commission has proven that there was misconduct, because it has shown the Claimant made the conscious, deliberate and willful decision to not comply with the employer's policy when he was aware that not complying could lead to him being suspended from his job. My reasons for this finding follow.

[42] I do not agree with the Claimant that his employer had to specifically use the word "suspended" when explaining to him the consequences of non-compliance with the vaccine passport requirement. As noted above, the law uses the word "suspended" when describing the situation where a claimant can no longer work for a period of time because the claimant committed misconduct. In my opinion, the employer does not have to use the word "suspended" for the Commission to prove the Claimant was suspended from his job due to his misconduct. I think it is sufficient for the Claimant's employer to have told him he was required to have a vaccine passport to enter the new building and he would "not be permitted to work" at the new building if he did not have a

vaccine passport. In my view, the phrase “not permitted to work” has the same meaning and effect as being “suspended” from your job.

[43] The Claimant was made aware he would be required to work on site in a new building. He testified that he would have to use a computer workstation at the new building to do his work. This meant that he could no longer work from home. His employer also told him that a vaccine passport would be required to enter the new building. A passport would show that the holder of passport had received two doses of the vaccine for COVID-19. The Claimant told his employer he did “not have a passport, nor intent to get one.” His employer then told the Claimant that he would not be permitted to work at the new building unless proof of double vaccination was provided or he had an approved exemption from the requirement. The Claimant testified he did not ask for an exemption. The Claimant next asked for a “work around.” The Claimant testified that a workaround would be him continuing to work from home. He said that he was supposed to move to the new building the week before December 16, 2021. He did not move and said the employer stopped negotiating with him on December 16, 2021 when it sent him an email asking that he return the employer’s computer to the former building.

[44] This evidence tells me the Claimant was aware he was required to work on site in the new building, and aware of the requirement to have a vaccine passport so that he could work at the new building and knew that he could be suspended (not permitted to work) for not complying with the requirement. The Claimant chose not to get a vaccine passport as required by his employer. This means the Claimant made the conscious, deliberate and wilful decision to not comply with the policy when he knew that by doing so he could be suspended from his job and not be able to carry out the duties owed to his employer. As a result, I find that the Commission has proven the Claimant was suspended from his job due to his own misconduct within the meaning of the EI Act and the case law described above.

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

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

Conclusion

[46] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits for the period of the suspension.

[47] This means that the appeal is dismissed.

Raelene R. Thomas
Member, General Division – Employment Insurance Section