



Citation: *SO v Canada Employment Insurance Commission*, 2022 SST 1616

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

Decision

Appellant: S. O.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (472504) dated June 10, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Videoconference

Hearing date: November 29, 2022

Hearing participant: Appellant

Decision date: December 8, 2022

File number: GE-22-2303

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 suspended from his job. The Claimant's employer says he was suspended because he went against its vaccination policy: he didn't say whether he had been vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

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

Issue

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

Analysis

[7] 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.²

[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

¹ Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their job because of misconduct are disentitled from receiving benefits.

² See sections 30 and 31 of the Act.

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 that the Claimant was suspended from his job because he went against his employer's vaccination policy.

[10] The Claimant says he couldn't make an informed decision about taking the COVID-19 vaccine because his employer didn't answer his questions about the vaccine. He says his employer placed him on an unpaid leave of absence and he was not allowed to work starting November 2, 2021.

[11] The Commission says the Claimant was placed on unpaid leave because he didn't follow the employer's COVID-19 vaccination policy. It considers the unpaid leave to be a suspension.

[12] The Claimant's employer issued a record of employment that lists dismissal as the reason for issuing it. But, the employer told the Commission that it placed the Claimant on unpaid leave because he didn't comply with its vaccination policy. The employer added that the Claimant has been reinstated and working since March 14, 2022.

[13] The Claimant doesn't dispute the reason his employer didn't allow him to work. Even though he says it was unpaid leave, I find the Claimant's employer suspended him. I find that the reason he wasn't allowed to work is that he went against his employer's vaccine policy.

[14] The Claimant says his employer broke the law by coercing employees to take experimental medicine that hasn't been approved. But, I find that the Claimant was suspended from his job because he went against his employer's COVID-19 vaccination policy.

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

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

[16] 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 Act. It sets out the legal test for misconduct – the questions and criteria to consider when examining the issue of misconduct.

[17] Case law says that, to be misconduct, 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 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.⁵

[18] 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.⁶

[19] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁸

[20] I have to focus on the Act only. I can't make any decisions about whether the Claimant has other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.⁹ I can

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.

⁷ See section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[21] 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. 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.¹⁰

[22] The Claimant says that there was no misconduct because his employer didn't answer his questions about its vaccination policy. He says the employer coerced employees to take an experimental medicine, so it is guilty of misconduct for breaking the law.

[23] The Commission says there was misconduct because the Claimant knew about his employer's vaccination policy, deadlines and consequences of non-compliance, but he chose not to comply with the policy due to his personal beliefs.

[24] I find that the Commission has proven that there was misconduct, because the Claimant knew that he could be suspended from his job if he went against his employer's COVID-19 vaccine policy.

[25] The Claimant told the Commission that his employer wanted him to make a decision on taking the COVID-19 vaccine, but didn't answer his questions. He said that because of this, he couldn't make an informed decision. The Claimant said he didn't decide not to comply with his employer's policy, he just wanted to have his questions answered.

[26] The Claimant also said he didn't think he should have to disclose his vaccine status to the employer because this wasn't in his employment contract and it is his private medical information.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[27] The Claimant was placed on unpaid leave on November 2, 2021. But his employer has since repealed its COVID-19 vaccine policy and the Claimant has returned to his job.

[28] The employer sent the Commission a copy of its COVID-19 vaccination policy. The policy is effective September 14, 2021. The policy states that:

- the procedures apply to all employees,
- all employees must disclose their vaccination status by September 1, 2021,
- employees who don't disclose their vaccination status by November 1, 2021 will be placed on a non-disciplinary administrative leave of absence,
- the employer will consider requests for exemptions if an employee can't be vaccinated due to a ground protected under the *Human Rights Code*, and
- employees who don't comply with the procedures of the policy may face administrative or disciplinary action, up to and including termination.

[29] The Claimant testified that he got an email about the vaccine mandate on September 14, 2021. He said he sent his employer a notice of liability with questions about the vaccine and testing, but got no answers. He said he sent letters of liability three more times, but never got a response. The Claimant testified that he went to his union president and sent other emails, but again, he got no response.

[30] The Claimant sent copies of documents he sent to his employer. One is a Notice of Liability, dated September 23, 2021. It included two notices to produce with questions about the COVID-19 vaccine and testing. In the notices, the Claimant said he needed information in the response to specific questions to decide if he would give informed consent. The notices include excerpts from the *Genetic Non-Discrimination Act*, the *Criminal Code of Canada*, and the Nuremberg Code.

[31] I asked the Claimant if he asked a doctor or other medical professional the questions he had put to his employer. The Claimant questioned why he would ask another doctor. He said his employer mandated the vaccine. He added that the notices he sent to his employer required that the employer answer his questions in affidavit form.

[32] I understand that the Claimant wanted information to help him decide if he would take the COVID-19 vaccine. The questions he asked are wide-ranging. Because COVID-19 is relatively new, it is not clear if the employer could have responded to each question to the Claimant's satisfaction. Even though the employer didn't respond, I find that the Claimant could have tried to get answers elsewhere if he truly wanted to know if taking the COVID-19 vaccine was safe and effective.

[33] The Claimant said he requested accommodation on religious grounds on the day before his employer placed him on leave. He said he added an addendum later, after which his employer told him he had 24 hours to complete a religious accommodation request form and send it back.

[34] The Claimant sent the Commission a copy of his request for accommodation. He also sent a copy of an affidavit. The affidavit states that disclosing private medical information, testing, immunizing against COVID 19, and injecting a substance into his body conflict with his religious beliefs. The Claimant sent the Commission a spiritual declaration that includes biblical references in support of his position on the COVID-19 vaccine.

[35] The Claimant testified that his employer didn't respond to his request for accommodation. He said the employer accepted his request as on November 15, 2021, so he should have been back at work just like everyone else. He says his employer discriminated against him.

[36] The Claimant's request for accommodation is dated October 28, 2021. He said his employer received it on November 1, 2021. This is the day the Claimant had to disclose COVID-19 vaccine status. The Claimant said his employer received the

addendum to his request and asked him on November 15, 2021 to complete a form. The employer acknowledged receipt of the Claimant's request by email on November 28, 2021. It said the employer would review the request, but the Claimant would stay on unpaid leave.

[37] I have no reason to doubt the Claimant's testimony that the employer didn't give him an answer on his request. But he also acknowledged that his request was late. The policy says that accommodation requests must be submitted without delay. The Claimant did not do this.

[38] I don't find that the Claimant's request was approved. And even though the policy states that employees with pending requests must continue to do testing, the Claimant had already been placed on unpaid leave. I don't find that his situation is the same as co-workers he testified about, who asked for accommodation earlier than he did. So I am not satisfied that his employer discriminated against him by not allowing him to return to work pending its decision.

[39] The Claimant says his employer can't change his employment contract to require him to participate in a medical experiment. He also states the employer broke the law with its vaccine mandates. He again referred to the *Criminal Code of Canada* and also the *Canadian Bill of Rights*. The Claimant says the employer didn't say how his vaccination status would affect his job performance.

[40] In Canada, there are laws that protect an individual's rights, such as the right to privacy or the right to equality (non-discrimination). The Canadian Bill of Rights is one of these laws, and there are a number of provincial laws that protect rights and freedoms.

[41] I understand that the Claimant thinks his employer's vaccine mandate is illegal. But I am not allowed to make rulings on the laws referred to above. The Claimant has to go to a different tribunal or a court to address that. I find that the same is true about whether the Claimant's employer could change his employment contract to require him to take the COVID-19 vaccine.

[42] The Claimant testified that his conduct doesn't constitute misconduct. He questions how his conduct could be wilful when the employer didn't answer his questions to allow him to give informed consent to the vaccine.

[43] I find that the Claimant's conduct was willful. He confirmed that he saw and read the employer's policy. So, he knew about the deadline to disclose his vaccination status. He knew that if he wanted to ask the employer to accommodate him on a protected ground, he had to do so without delay.

[44] The Claimant said that in the past, his employer has failed to follow through on dismissal on several occasions. He said employees were not dismissed, but were moved to different positions. So he questions why it would be different with this policy. He said he didn't really believe his employer would dismiss him.

[45] In spite of what the Claimant's employer may have done in the past, I find that its COVID-19 vaccination policy was very clear about what would happen if the Claimant didn't disclose his vaccine status by the deadline. The policy says employees who don't do so "will be placed on a non-disciplinary administrative leave of absence without pay effective November 2nd, 2021". Since the policy seeks to provide and maintain a safe work environment for all, I find the Claimant should have known that his suspension was a real possibility.

[46] The Claimant referred to a decision of the General Division of the Tribunal in support of his position that there was no misconduct in his case.¹¹ I am not bound by decisions of decisions of other members of the Tribunal. But I find the Claimant's case is different than the one he cited.

[47] The Tribunal Member in the case the Claimant referred to found that the Commission hadn't proven that the claimant knew or should have known his conduct could get in the way of carrying out his work duties. In that case, the claimant worked

¹¹ See *CG v Canada Employment Insurance Commission*, 2022 SST 356.

outside most of the time and the employer's statements show that it could have worked with the claimant even if he weren't vaccinated.

[48] The Claimant didn't say how he believes his case is similar to the one he cited. He only says according to the decision the Commission has the onus of proving four elements of misconduct. But, after reading the decision, I still find that the Commission has proven the Claimant's conduct constitutes misconduct.

[49] I find that the Claimant's action, namely going against his employer's COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not to say if he was vaccinated. He did so knowing that he would be placed on unpaid leave. I find that this means that he was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

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

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

[51] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be suspended from his job.

Conclusion

[52] 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 October 31, 2021 to March 11, 2022.

[53] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section