



Citation: *MW v Canada Employment Insurance Commission*, 2022 SST 1623

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

Decision

Appellant: M. W.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (457470) dated February 21, 2022
(issued by Service Canada)

Tribunal member: Leanne Bourassa

Type of hearing: Teleconference

Hearing date: May 27, 2022

Hearing participants: Appellant

Decision date: August 26, 2022

File number: GE-22-1124

Decision

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

[2] The Claimant was not on a voluntary leave of absence, but was placed on unpaid leave (suspended) because of his own misconduct when he refused to comply with his employer's policies. This means he is disentitled from receiving Employment Insurance (EI) benefits.

Overview

[3] The Claimant was placed on unpaid leave from his job effective January 10, 2022. He applied for EI benefits. The Canada Employment Insurance Commission (Commission) looked at the Claimant's reasons for being out of work. It decided that he voluntarily left (or chose to be placed on unpaid leave from) his job without just cause, so it wasn't able to pay him benefits.

[4] I must decide whether the Claimant took a voluntary leave from his employment. If he did, did he have reasonable alternative to taking an unpaid leave from his job. If he was not on leave voluntarily, I have to decide if he was suspended because of his own misconduct.

[5] The Commission says that the Claimant could have avoided being placed on leave by getting vaccinated or discussing his concerns with his employer before accepting to be placed on leave. He knew about his employer's policy and chose not to comply with it.

[6] The Claimant disagrees and states that he did not choose to take the unpaid leave, it was imposed on him. He says his employer's policy is illegal and in violation of his privacy rights, the criminal code and violated the terms of his employment and his collective agreement.

Issue

[7] Was the Claimant on leave from his job as a result of voluntary leaving or misconduct?

[8] In either case, is he entitled to EI benefits?

Analysis

[9] The Commission says the Claimant is disentitled to EI benefits because he took a voluntary period of leave from his job without just cause.

[10] I will start my analysis by looking at why the Claimant was not working.

Voluntary leaving or Misconduct

– *The Law*

[11] The Employment Insurance Act (Act) sets out two different notions that may result in a claimant being disqualified from receiving benefits. These are voluntary leaving and misconduct.¹

[12] The notions are linked because it is not always clear whether the unemployment resulted from an employee being dismissed for misconduct or from the employee deciding to leave. It is open to me to make a finding based on either of those two grounds.² That means that when the reason for separation from employment is not clear, I have the jurisdiction to decide whether it is based on voluntary leaving or misconduct. This is because it does not matter who took the initiative in ending the employment relationship because both cases can result in a disqualification.³

[13] While the jurisprudence deals specifically with disqualifications because of misconduct or voluntary leaving, I find that the logic used to allow these cases to be

¹ This is set out in the *Employment Insurance Act* (Act) at section 30.

² See *Canada (Attorney General) v. Borden*, 2004 FCA 176.

³ Both of these issues can result in disqualification under section 30(1) of the Act. The Court has also reached this conclusion in its decisions in *Canada (Attorney General) v. Easson*, A-1598-92 and *Canada (Attorney General) v. Desson*, 2004 FCA 303.

treated similarly also applies in cases of disentitlements for suspensions for misconduct and voluntary leaves of absence taken without just cause.⁴ This is because all of these sections of the law deal with the Claimant's actions leading to their unemployment, either temporarily (in the case of leave or suspension) or permanently (in the case of dismissal for misconduct or voluntary leaving).⁵

[14] In this case, the Claimant has said that he was not voluntarily on a leave of absence from his employment. He also says that he refused to comply with his employer's vaccination policy and because of that, his employer put him on an involuntary, unpaid administrative leave of absence. Since the employer decided that the Claimant could not work because he refused to comply with a policy, I find that the issue in this case is not a voluntary leave, but rather a suspension due to misconduct.

[15] I would also consider this to be a case of misconduct because if it were not for the employer's policy, the Claimant's decision not to be vaccinated would not have resulted in his being on an unpaid leave of absence. Without the policy, there would have been no unpaid leave.

[16] Finally, I don't consider this to be a case of a voluntary leave of absence because the Act sets out particular criteria for that situation. In this case, the Claimant and his employer did not reach an agreement that he would take a leave of absence, nor did they agree on the date when the Claimant would resume employment.⁶ The Claimant's unpaid leave of absence was not something he agreed to. There was also no agreed to date of return, because it was dependent on the Claimant complying with the vaccination policy, which he was not willing to do.

[17] So, in this case, I find that the reason the Claimant was not working was not a voluntary leave of absence, but a suspension due to misconduct.

⁴ Disentitlement in the case of a suspension for misconduct is addressed in section 31 of the Act. Disentitlement in the case of a period of leave without just cause is addressed in section 32 of the Act.

⁵ This means that the Court's logic in *Easson and Desson* would apply to circumstances described in sections 31 and 32 of the Act.

⁶ See section 32 of the Act.

[18] I recognize that the Commission's arguments are directed towards demonstrating that there was not just cause for a voluntary leave of absence, and not a disentitlement because of a suspension due to misconduct. However, its written argumentation and the documentation it provided does raise points that are more appropriately applied to an analysis of a suspension due to misconduct. So, I do not believe they will suffer any prejudice from my conclusion that this is a case of a suspension and not a voluntary leave. The Claimant was also questioned during the hearing about facts that were relevant to both the tests for voluntary leave and misconduct.

Was the Claimant suspended from his job due to his own misconduct?

[19] To answer the question of whether the Claimant was suspended from his job due to his own misconduct, I have to first determine why he was not working. Then, I have to determine whether the law considers that to be misconduct.

– Why was the Claimant on an unpaid leave of absence from his job?

[20] I find that the Claimant was put on an unpaid leave (suspended) from his job because he did not comply with his employer's mandatory COVID-19 vaccination policy.

[21] The Claimant and the Commission both agree that the employer implemented a new COVID-19 vaccination policy. The policy had a deadline for employees to be vaccinated. The policy also said that if an employee did not produce proof of vaccination by the deadline, they would be placed on an unpaid leave of absence until the required documentation was provided. The Claimant did not comply with the policy by the deadline and was told he was being put on an administrative leave of absence. He does not dispute this.

[22] The employer told the Claimant in a letter dated January 6, 2022 that he had failed to comply with the mandatory vaccination policy. Effective January 10, 2022 he would be placed on an unpaid leave of absence for 6 weeks. If he continued to be non-compliant, as of February 2, 2022 he would be subject to 2 weeks of disciplinary

suspension without pay and then termination with cause thereafter for continued non compliance.

[23] So, I can see no disagreement that the Claimant was placed on unpaid leave because he had not complied with his employer's policy.

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

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

[25] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.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 actions to be misconduct under the law.⁸

[26] 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 disciplined because of that.⁹

[27] 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 because of misconduct.¹⁰

[28] It is not the role of the Tribunal to determine whether the suspension (in this case unpaid leave of absence) was justified or was the appropriate sanction.¹¹

[29] The Commission says that the Claimant was placed on a leave of absence because he did not wish to be vaccinated. He confirmed he did not comply with the

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

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

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

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

¹¹ See *Canada (Attorney General) v. Caul*, 2006 FCA 251 251 at paragraph 6.

employer's policy because of personal reasons and he thought his rights were being violated. The Claimant indicated it was a personal choice not to comply.

[30] The Claimant says that he has been disciplined for not agreeing with the employer's illegal COVID-19 vaccination policy. He says the employer's policy is in violation of various statutes and was never a term of his employment or his collective agreement. He has been ready, willing and able to work every day since he was put on unpaid leave.

[31] The Claimant told the Commission that on September 20, 2021 his employer adopted a mandatory vaccination policy and he was made aware of it by email. He was made aware that on November 26, 2021 the employer required all employees to be vaccinated or they would be placed on leave. He did not comply for personal reasons.

[32] The Claimant submitted to the Tribunal letters he received from his employer about his obligations under their policy¹²:

- Dated October 26, 2021
 - This letter says that the Claimant failed to disclose his vaccination status by October 20, 2021. He was required to participate in an education session no later than November 10. The expectation was after that he would get his required doses of a COVID-19 vaccine by December 20, 2021. Failure to do this would result in unpaid leave for 6 weeks and possible further discipline up to and including termination.
- Dated November 17, 2021
 - This letter says that the Claimant did take the education session but still failed to disclose his vaccination status. He is begin given a verbal warning for failure to comply. If he does not receive the required doses by December 20, 2021 he would be placed on unpaid leave of absence starting January 10, 2022 for 6

¹² These were in addition to the letter mentioned above advising him of his leave of absence.

weeks, then a 2 weeks disciplinary suspension with possible further discipline up to and including termination.

- Dated November 26, 2021
 - This letter says that as of November 20, 2021, the Claimant had still failed to disclose his vaccination status or receive a first dose of vaccine, so he is not in compliance with the policy. If he does not receive the required doses by December 20, 2021 he would be placed on unpaid leave of absence starting January 10, 2022 for 6 weeks, then a 2 weeks disciplinary suspension with possible further discipline up to and including termination.

[33] Each of these letters sets out the Claimant's obligations and the consequences for not complying with them. The Claimant confirmed at the hearing that in each case either his supervisor gave him the letter or there was a meeting to give him a warning. So, he knew what was expected.

[34] The Claimant also explained that he made several efforts to avoid complying with the employer's requirements. He consulted the policy and read the materials online before deciding not to disclose his status. He brought it up with the union and signed a grievance form. He submitted a religious exemption request that was refused. He gave his employers a Notice of Liability contesting the policy. This all shows me he was aware of his obligations and intentionally choosing not to comply with the policy.

[35] On the evidence, it is clear that Claimant's action of not complying with the employer's vaccination policy was conscious, it was deliberate and it was intentional. He did not disclose his vaccination status. He knew that if he did not comply by getting vaccinated he would be placed on unpaid leave. He still chose not to comply and understood he could be placed on leave because of it. That was wilfulness.

[36] The Claimant's actions in refusing to comply with the employer's vaccination policy was misconduct for EI purposes. I find that it has been proven there was misconduct because the Claimant committed the conduct of refusing to comply with the

employer's vaccination policy, that refusal resulted in his being put on unpaid leave (suspended), his conduct was wilful and he knew or ought to have known that he could be suspended and ultimately dismissed from his job if he did not comply with the employer's policy.

[37] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct. Because of that, he is disentitled to EI benefits.

– ***Duration of the disentitlement***

[38] A claimant who has been disentitled because of a suspension for misconduct is not entitled to benefits until the period of suspension expires, they lose or voluntarily leave their employment or they have accumulated enough hours of insurable employment to qualify to receive benefits.¹³

[39] Since the Claimant was placed on leave, the employer's policy has changed. While it was originally said that he would be terminated, it appears that the employer has instead invited the Claimant back to work. He testified that has returned to work, although at the time of the hearing he was off on sick leave.

[40] When the Claimant went back to work, his period of suspension expired. So, his disentitlement would end at that date.

Other arguments

[41] The Claimant has argued that his employer's policy was in violation of the Freedom of Information Act, the Criminal Code of Canada and the Nuremberg Code. He also says that the policy is not a part of the terms and conditions of his employment, or his collective agreement.

[42] Had the Claimant voluntarily taken a leave of absence from his job, I would have to consider if these points give him just cause for leaving. In deciding that the Claimant did not take a leave of absence, I did reflect on the relevance of those arguments.

¹³ This is set out in section 31 of the Act.

However, since the Claimant did not voluntarily stop working, these arguments are not directly relevant to the situation at hand because he does not need to show he had just cause for leaving his job.

[43] In cases for a disqualification or disentitlement from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's act or omission. The conduct of the employer is not a relevant consideration.¹⁴

[44] However, I would note that on each letter sent to the Claimant, the employer does state that they are obligated, pursuant to the Ontario Occupational Health and Safety Act to take every reasonable precaution to ensure a safe workplace and protect its workers. They also provide space for medical and human rights exemptions.

[45] I understand the Claimant has concerns about the employer's policy. Those concerns are beyond the authority of the Tribunal. Disputes under the collective agreement need to follow the appropriate arbitration procedure and human rights complaints can be brought to the tribunal dedicated to hearing those claims.

Conclusion

[46] I find that the Claimant was suspended from his employment because of his misconduct. So, he is disentitled from receiving benefits for the period that he was on an unpaid administrative leave of absence.

[47] This means that the appeal is dismissed.

Leanne Bourassa
Member, General Division – Employment Insurance Section

¹⁴ See *Paradis v. Canada (Attorney General)*, 2016 FC 1282