



Citation: *MH v Canada Employment Insurance Commission*, 2022 SST 1661

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

Decision

Appellant: M. H.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (493051) dated July 4, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Videoconference

Hearing date: November 22, 2022

Hearing participant: Appellant

Decision date: December 8, 2022

File number: GE-22-2322

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 lose 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 that he was suspended because he went against its vaccination policy: he didn't get 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.

Matter I have to consider first

[6] The Claimant sent an email to the Tribunal before the hearing. In it, he said he would like to restrict himself to proving that the medications in question (what is referred to in evidence as the COVID-19 vaccine) are frequently lethal and not safe for humans. He questioned Health Canada's authorizing the vaccination and that it has not been rescinded.

[7] I clarified with the Claimant that my role is not to make decisions on the safety or efficacy of the vaccine that the Claimant refers to as a medication. I stated that my role is limited to deciding the reason the Claimant lost his job, and whether that constitutes

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.

misconduct. But, I explained to the Claimant that it is open to him to make an argument that his position is that the COVID-19 vaccine is an experimental, lethal medication, so for this reason, his employer could not change the terms and conditions of his employment to require him to take it.

Issue

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

Analysis

[9] 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

[10] 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?

[11] I find that the Claimant was suspended from his job because he went against his employer's vaccination policy.

[12] The Claimant says he refused to comply with his employer's COVID-19 vaccination policy. He disputes that the COVID-19 vaccinations are vaccinations and questions the right of his employer to change the conditions of his employment.

[13] The Commission says the Claimant didn't comply with his employer's COVID-19 vaccine policy and that's why he was suspended from his job.

[14] The Commission's initial decision states that the Claimant isn't entitled to EI benefits because he lost his job because of misconduct. The Commission changed its

² See sections 30 and 31 of the Act.

decision on reconsideration. It said the Claimant was suspended from his job as a result of his misconduct.

[15] The Claimant says that re-classifying his dismissal as a suspension doesn't make sense. He says his employer didn't place him on unpaid leave; rather, he says he was just dismissed from his job. He added that the day the employer lifted its vaccine mandate, it re-hired him.

[16] The Claimant's employer issued a record of employment (ROE). It listed "Dismissal or suspension" as the reason for issuing it. The Commission spoke to the person at his place of employment who issued the ROE. They said the Claimant was placed on unpaid leave because he refused to adhere to the mandatory COVID-19 vaccination policy of the company of which it is a subsidiary.

[17] The Claimant testified that his employer had hired replacements and he explained why. He said they had not been great at their jobs, so when the vaccine mandate was lifted, the employer let them go, so there was a place for him to be re-hired.

[18] In spite of the Claimant's testimony, I give more weight to his employer's statement concerning what action it took. The ROE includes suspension as a reason for issuing it. The person who issued the ROE told the Commission that it had placed the Claimant on unpaid leave for going against its vaccine mandate. This is consistent with the consequence of non-compliance listed in the policy. So, I find it more likely than not that the Claimant's employer placed him on an unpaid leave. I find this means the employer suspended the Claimant.

[19] The Claimant doesn't dispute the reason his employer suspended him. Even though he says he lost his job through no fault of his own, 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?

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

[21] 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.

[22] 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

[23] 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 let go because of that.⁶

[24] 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

[25] 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 dismissed (or in this case wrongfully suspended) or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't

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.

for me to decide.⁹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[26] 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

[27] The Claimant says there was no misconduct. He says there is no such thing as forced vaccination in Canada. So his refusal to take the COVID-19 vaccine, which he says is not a vaccination and is frequently lethal, can't be classified as misconduct. He also says his employer can't change the conditions of his employment.

[28] The Commission says there was misconduct because the Claimant didn't comply with his employer's COVID-19 vaccination policy. It says the Claimant knew about the consequences this would have on his employment.

[29] 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.

[30] The Claimant worked as a bus driver. He said that during the pandemic, he worked in a sealed cab that was separated from the passenger area by a full plastic barrier. Because of this, he thinks the vaccine mandate is arbitrary, and not related to any human health concern or potential transmission of COVID-19.

[31] The Claimant explained that the employer's bus company is under the umbrella of the larger provincial bus company. So, the rules of the larger company apply to his employer also. The Claimant testified that any driver who couldn't produce a document saying they were vaccinated was not allowed to drive a bus.

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

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

[32] The Claimant's employer sent a copy of the COVID-19 vaccine policy of its parent company to the Commission. The employer explained that it is a subsidiary of the provincial bus company and has to follow its rules. The policy says:

- employees must be vaccinated against COVID-19 by November 29, 2021,
- employees who can't be vaccinated can ask for an exemption on medical or other grounds protected by the provincial human rights code,
- employees who don't comply with the policy and don't get an exemption will be placed on an unpaid leave of absence for a period, and
- if an employee remains unvaccinated, the employer may dismiss them.

[33] The Claimant's testimony about the relationship with his bus company and the provincial bus company is consistent with the employer's statement to the Commission. So I accept as fact and find that his employer's bus company is a subsidiary of the provincial bus company. I also find that the COVID-19 vaccine policy applies at the Claimant's place of employment.

[34] The Claimant testified that he didn't see the employer's policy. But he said he was aware that the employer required employees to be vaccinated by November 29, 2021. He said he didn't apply for any exemption because he objects to "the medication". He added that his position is that no human being can be subject to lethal medicine.

[35] I asked the Claimant about the Commission's submission that he knew in advance that if he didn't show proof of taking the COVID-19 vaccine he could lose his job. The Claimant responded by stating it was wrong on every level. He testified that it is not a vaccine, it's deadly. He said that it is complete nonsense on the part of the Commission to pretend that there was some health policy behind the vaccine or that there were unusual circumstances that warranted taking it. The Claimant referred to clinical trial data that shows the COVID-19 vaccine is not good.

[36] The Claimant didn't answer the question noted above directly. But, the Commission's notes show that he said that he knew that if he wasn't "injected with this medication", he wouldn't have a job.

[37] From the above, I find that the Claimant knew what his employer had asked him to do. I find that he also knew what would likely happen if he wasn't vaccinated against COVID-19 by the deadline.

[38] The Claimant has strong beliefs about what he says is a lethal medication that his employer, through its parent company, was forcing employees to take. As noted already, the Claimant says if he has the right to refuse a vaccine, then exercising that right can't be considered misconduct. But a deliberate violation of an employer's policy is considered misconduct under the law.¹¹ And I find that this is what the Claimant did.

[39] The Claimant argues that his employer changed the terms of his employment, but there are limits to the ability to do this. He asks if the employer has the right to change the conditions of employment to include injection of potentially lethal medicines.

[40] In spite of the Claimant's belief that the COVID-19 vaccine is a lethal medication, and that his employer can't force him to be part of a global experiment, I don't find that in the unusual circumstances of the COVID-19 pandemic, the employer updating its policy, as it states, to keep its employees, customers and communities it serves safe is unreasonable.

[41] It is not for me to decide the efficacy or lethality of the vaccine. It is not for me to decide if the employer violated the Claimant's rights by requiring him to take the COVID-19 vaccine. Nor is it for me to decide whether the employer was right to change the terms and conditions of the Claimant's employment. There are other tribunals the Claimant can go access to have these questions adjudicated.

[42] 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

¹¹ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Ganon*, 2002 FCA 460.

not to take the vaccine. He did so knowing that he would be placed on an unpaid leave absence. I find that this means that he was suspended. For these reasons, I find that the Commission has proven that there was misconduct.

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

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

[44] 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

[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