



Citation: *JC v Canada Employment Insurance Commission*, 2023 SST 325

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

Decision

Appellant: J. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (509019) dated September 10, 2022 (issued by Service Canada)

Tribunal member: Raelene R. Thomas

Type of hearing: Videoconference

Hearing date: December 13, 2022

Hearing participant: Appellant

Decision date: January 4, 2023

File number: GE-22-3173

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant lost his job because of misconduct (in other words, because his actions something caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant's employer adopted a policy that required all its employees to be fully vaccinated for COVID-19 or to have an approved exemption to vaccination. Employees who were not vaccinated and did not have an approved exemption were required to have a negative test result from a COVID-19 rapid antigen test bi-weekly. The Claimant was not vaccinated and did not have an exemption by the required date. He also refused to have rapid tests for COVID-19.

[4] The Claimant's employer placed him on a leave of absence on October 28, 2021. That leave was extended to December 14, 2021. The Claimant was then suspended from that date and later dismissed from his job on January 26, 2022 for not complying with its policy.

[5] The Commission accepted the employer's reasons why the Claimant was no longer working. It decided the Claimant lost his job because of his misconduct. Because of this, the Commission decided the Claimant was disqualified from receiving EI benefits.

[6] The Claimant does not agree with the Commission. He does not agree with the use of the word "misconduct" to describe his actions. He says he did not commit misconduct. He applied for an exemption to vaccination for religious reasons but was

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

denied. He argues that he should be entitled to EI benefits because the Commission's decision to deny him benefits is not in line with the purposes of the EI Act.²

Matters I have to consider first

The employer is not an added party to the appeal

[7] Sometimes the Tribunal sends a claimant's 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.

[8] 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 from October 28, 2021 to December 14, 2021

[9] 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

[10] In the Claimant's case, his employer initiated the stoppage of his employment on October 28, 2021 when he was placed on unpaid leave. He was later suspended on December 14, 2021 and then dismissed on January 26, 2022.

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

² The Claimant referenced the last paragraph on page GD3-35 in the appeal file when making this argument.

³ See section 32 of the *Employment Insurance Act* (EI Act).

[12] 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

[13] As found below, the evidence shows it was the Claimant's conduct, of refusing to comply with the vaccine policy that led to him not working from October 28, 2021. I am satisfied that, for the purposes of the EI Act, the Claimant's circumstances the period of unpaid leave from October 28, 2021 to December 14, 2021 can be considered as a suspension.

Issue

[14] Was the Claimant suspended and later dismissed from his job because of misconduct?

Analysis

[15] 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

[16] To answer the question of whether the Claimant was suspended and later dismissed from his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended and later dismissed. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended and later dismissed from his job?

[17] I find that the Claimant was suspended and later dismissed from his job because he did not comply with the employer's vaccination policy.

[18] The Claimant's employer adopted a policy that required all employees to have received two doses of a COVID-19 vaccine by October 31, 2021. If an employee did not provide proof of vaccination by that date they were placed on a leave of absence.

⁴ See section 31 of the EI Act.

⁵ See sections 30 and 31 of the EI Act.

Employees could apply for an exemption on the basis of a protected legal ground, for example, medical or religious. Employees who did not have an approved exemption to vaccination or who were not fully vaccinated were required to submit to ongoing COVID-19 rapid antigen testing twice per week at their own expense. Employees who did not comply with the testing requirements would be deemed unfit for work and placed on leave without pay. The employer reserved the right to terminate the employment of an employee who is away from work on a non-culpable basis or a culpable basis where warranted.

[19] The Claimant testified he asked for an exemption to vaccination for religious reasons. His request for exemption was refused. The Claimant testified he had some medical issues but he did not ask for an exemption for medical reasons. The Claimant said he refused to get tested for COVID-19 because he was perfectly healthy. He thought it was discriminatory that only the unvaccinated were required to be tested.

[20] The evidence tells me the Claimant was suspended and later dismissed because he failed to comply with his employer's policy, specifically to be tested for COVID-19 as required.

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

[21] Yes, the reason for the Claimant's suspension and later dismissal is misconduct under the law. The reasons for my finding follow.

[22] The EI 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.

[23] 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. This is how I refer to the courts' decisions that apply to the circumstances of this appeal.

includes conduct that is so reckless 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

[24] 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

[25] 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

[26] 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

[27] 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 bargaining agreement. Issues about 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?

[28] The Commission has to prove the Claimant was suspended and later dismissed from his job because of misconduct. The Commission has to prove this on a balance of

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.

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

[29] The Commission says it concluded the Claimant's refusal to comply with the employer's COVID-19 vaccination policy constituted misconduct within the meaning of the EI Act because refusal to comply with a legitimate and reasonable order of instruction constitutes misconduct. It says the Claimant's failure to be vaccinated is considered misconduct because it "results in him no longer being compatible within the objectives of his employment relationship." Furthermore, the Commission says, the Claimant's unwillingness to abide by the employer's policy is misconduct because the Claimant was aware of the consequences that his choice would have on his employment.

[30] The Claimant testified that the policy started in November 2021. Before that he did not have to do anything. He is not sure if he saw the actual policy. He did ask for an exemption based on his religious beliefs. His pastor wrote a letter supporting his request. He sent his exemption request to Human Resources. He had a telephone interview with Human Resources, who he said even though they are not theologians questioned him about his beliefs. His foreman and union representative were also on the phone during the interview. The Claimant testified that he received a letter from his employer on October 29, 2021, telling him his request for exemption did not meet the legal exemption requirements. He was required to be fully vaccinated or to participate in the testing program.

[31] The Claimant testified he did not want to get tested because he was perfectly healthy. He thought it was discriminatory because only the unvaccinated were being tested. He did say to his employer that he would test if he was unwell or not healthy. The Claimant explained there was no religious or medical reason for his refusal to test. He viewed the testing as a medical procedure.

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

[32] The Claimant testified he told his employer that his beliefs were so strong that if they wanted to fire him, although he did not want to get fired, without a religious exemption there was nothing he could do. The Claimant said his union has filed a grievance on his behalf. He has not filed a complaint with his province's human rights commission.

[33] The Claimant argued he did not commit misconduct. He referred to a definition of misconduct from the Free Dictionary. He does not think that what he did meets the definition of misconduct as written in the Free Dictionary. He submitted that the Commission has discussed his religious beliefs but, he says, who else but him knows what he believes in. The Claimant argued how can someone say he does not qualify because their personal beliefs and vaccination status are not prohibited grounds. The Claimant argued the Commission is looking for a reason to deny all these people who did not comply.

[34] I find the Commission has proven 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 not working. My reasons for this finding follow.

[35] The Claimant's employer introduced a policy that required all employees to be vaccinated for COVID-19 by October 28, 2021 or to have an approved exemption to vaccination for medical reasons or for human rights reasons. The policy provided that employees who did not have an approved exemption and were unvaccinated were to submit to twice-weekly rapid antigen COVID-19 testing. The Claimant applied for an exemption based on his religious beliefs. His request was refused. The Claimant refused to be tested for COVID-19 and told his employer that if they wanted to fire him there was nothing he could do without an exemption. When I consider this evidence, I find that, on a balance of probabilities, the Claimant was aware he had to be vaccinated for COVID-19 by October 28, 2021 or have an approved exemption and, if he did not, he would be required to be tested twice-weekly for COVID-19. He was not vaccinated and he knew he did not have an approved exemption by October 28, 2021. He then

told his employer that he would not get tested. This means the Claimant made the conscious, deliberate and wilful decision to not comply with the policy when he knew that by doing so there was a real possibility he could be suspended (placed on an unpaid leave of absence) and later dismissed from his job and not be able to carry out the duties he owed to his employer. As a result, I find that the Commission has proven the Claimant was suspended and later dismissed from his job due to his own misconduct within the meaning of the EI Act and the case law described above.

Was the Claimant suspended and later dismissed from his job because of misconduct?

[36] Based on my findings above, I find the Claimant was suspended and later dismissed from his job because of misconduct.

Conclusion

[37] The Commission has proven that the Claimant was suspended and later dismissed from his job because of misconduct. Because of this, the Claimant cannot receive EI benefits.

[38] This means that the appeal is dismissed.

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