



Citation: *DS v Canada Employment Insurance Commission*, 2023 SST 361

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

Decision

Appellant: D. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (500082) dated August 5, 2022
(issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Teleconference

Hearing date: January 10, 2023

Hearing participant: Appellant

Decision date: January 22, 2023

File number: GE-22-2790

Decision

[1] I am dismissing the appeal. I disagree with D.S. He is the Appellant (Claimant).

[2] The Canada Employment Insurance Commission (Commission) has shown the Claimant was suspended because of misconduct (in other words, because he did something that caused him to be dismissed).

[3] The Claimant is disentitled from Employment Insurance (EI) benefits during the period of his suspension from February 1, 2022, to July 8, 2022.¹

Overview

[4] The Claimant worked as a field service technician for a telephone company. The employer put him on unpaid leave (suspended him) because he didn't comply with their COVID-19 vaccination policy.

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

[6] The Commission accepted the employer's reason for the suspension. It decided the Claimant was suspended because of misconduct. Because of this, the Commission decided the Claimant is disentitled from receiving EI benefits.

Matters I have to consider first

Potential added party

[7] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. 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

¹ Section 31 of the *Employment Insurance Act* (EI Act) says a claimant who is suspended due to misconduct is disentitled from benefits until the week they return to their employment. The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid or payable.

party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Late documents

[8] In the interest of justice, I have accepted the documents and submissions received after the January 10, 2023, hearing.²

[9] At the outset of the hearing the Claimant indicated he had received and reviewed all the appeal documents up to the GD10 documents. However, during the hearing he could not find or recall receiving the GD3 documents. I arranged for the Tribunal to email another copy of the GD3 documents to him during the hearing. Prior to disconnecting from the hearing, the Claimant confirmed receipt of the GD3 documents. He says he was able to open and view those documents.

[10] To uphold the principles of natural justice and procedural fairness, I gave the Claimant leave to make final submissions by email, no later than January 17, 2023. His additional submissions were received on January 13, 2023. No other submissions have been received by the deadline.

[11] The Commission was provided copies of the late submissions and an opportunity to respond. So, I find there would be no prejudice to either party if the late documents were accepted.

Issues

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

Analysis

[13] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you.³

² Section 42 of the *Social Security Rules of Procedures* state that after considering any relevant factor, the Tribunal may give a party permission to file documents after the filing deadline.

³ See sections 30 and 31 of the Act.

[14] To answer the question of whether the Claimant was suspended 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?

[15] Both parties agree the Claimant was put on leave without pay (suspended) because he refused to be vaccinated by the deadline set out in the employer's mandatory COVID-19 vaccination policy.

[16] There is nothing in the file that would make me find otherwise. So, I find the Claimant was suspended from his job because he refused to be vaccinated in accordance with the employer's COVID-19 vaccination policy.

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

[17] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[18] To be misconduct, the conduct has to be wilful. This means the Claimant's conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵

[19] 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.⁶

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

[20] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out the duties toward his employer and there was a real possibility of being suspended or let go because of that.⁷

[21] The Commission has to prove the Claimant was suspended or lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Claimant was suspended or lost his job because of misconduct.⁸

[22] The Commission says there was misconduct for the following reasons:

- On September 1, 2021, the employer notified the Claimant of the requirement to provide proof of vaccination.
- The Claimant was aware that all employees were required to provide proof of being fully vaccinated by October 31, 2021. This was extended to January 31, 2022.
- The Claimant knew he would be placed on unpaid leave (suspended) if he failed to disclose that he was fully vaccinated.
- The Claimant didn't apply for an accommodation or exemption from the policy.

[23] The Claimant says he was working from home so the policy shouldn't apply to him. He believes his employer discriminated against him. His health decisions are private property. He argues his employer's vaccination policy violated his rights under the Charter. The employer's actions of forcing a medical intervention are a violation of the criminal code. The vaccination policy is not expressly or implicitly, directly or indirectly part of any collective agreement between the employer and the union.

[24] The Claimant acknowledges he received the emails from head office telling him he would be suspended without pay if he didn't comply with the vaccine policy. He says

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

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

he ignored those emails because they were asking him to do something with his body that he disagreed with. He made a personal choice not to be vaccinated.

[25] Five days before the hearing the Claimant submitted a copy of a decision issued by this Tribunal in *AL v CEIC*.⁹ He says his appeal should be allowed like *AL*'s, because

- *AL*'s collective agreement didn't require vaccination against COVID-19;
- *AL* was found to have the right in Canadian case law to refuse vaccination; and
- the Commission failed to address both those findings.

[26] I am not bound by other decisions made by this Tribunal.¹⁰ This means I don't have to follow those decisions. I can rely on them to guide me if I find them persuasive or helpful.

[27] With respect, I am not persuaded by the Member's findings or reasons in the *AL v CEIC* decision. As I understand it, that Member made his decision based on his findings regarding the employer's unilateral actions to impose the policy and whether the Claimant was legally justified in refusing to get vaccinated against COVID-19.

[28] The law doesn't say I have to consider how the employer behaved when determining misconduct for the purpose of EI benefits¹¹ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.¹²

[29] The Claimant also argued that he had the right to refuse based on the Supreme Court of Canada decision in *R v Morgentaler*, [1988] 1 SCR 30. I disagree because the

⁹ The Claimant submitted a copy of the Tribunal's decision before it was published, *AL v Canada Employment Insurance Commission (AL v CEIC)*, GE-22-1889.

¹⁰ I have to follow the Federal Courts' decisions that are on point with the case I am deciding. This is because the Federal Courts have greater authority to interpret the EI Act. I don't have to follow other Social Security Tribunal (Tribunal) decisions because other Members of the Tribunal have the same authority that I have. This rule is called *stare decisis*.

¹¹ See section 30 of the EI Act.

¹² See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.¹³

[30] It is also important to know that I can't make any decisions about whether the Claimant had 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.¹⁴ I can consider only one thing: whether the Claimant's actions or inaction is misconduct under the EI Act.

[31] I find the Commission has proven misconduct because the Claimant's refusal to be vaccinated was deliberate or intentional. There was a cause-and-effect relationship between his refusal to be vaccinated and the suspension. So, I find the Claimant was suspended from his job because of misconduct.

[32] The claim (benefit period) was effective January 30, 2022. The Claimant returned to work on Monday, July 11, 2022. This means the Claimant is disentitled from receiving EI benefits from Monday, February 1, 2022, to Friday, July 8, 2022.¹⁵

Conclusion

[33] The Commission has proven the Claimant lost his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[34] The appeal is dismissed, with modification to the dates of the disentitlement.

Linda Bell

Member, General Division – Employment Insurance Section

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

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

¹⁵ The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid or payable.