



Citation: *FS v Canada Employment Insurance Commission*, 2023 SST 381

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

Decision

Appellant (Claimant): F. S.
Representative: F. S.

Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (489514) dated July 12, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: Teleconference
Hearing date: December 20, 2022
Hearing participant: Appellant
Appellant's representative

Decision date: January 4, 2023
File number: GE-22-2765

Decision

[1] The appeal is dismissed.

[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 the Claimant is disentitled from receiving Employment Insurance (EI) benefits from November 29, 2021.¹

Overview

[3] The Claimant was placed on an unpaid leave of absence by his employer on November 27, 2021. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave because he didn't comply with their Covid-19 vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant was disqualified from receiving EI benefits from November 29, 2021.

[5] The Commission says the Claimant was well aware of the employer's mandatory vaccination policy and the consequences of failing to comply with the policy.

[6] The Claimant says he requested a religious exemption from the vaccination policy, but never received a response from the employer.

¹ Section 31 of the *Employment Insurance Act* says a claimant who is suspended from his employment because of his misconduct is not entitled to receive Employment Insurance (EI) benefits until the claimant meets one of the following provisions: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits.

Issue

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

Analysis

[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 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 the Claimant was suspended from his job because he didn't comply with the employer's vaccination policy.

[10] The Commission says the reason the employer gave is the reason the Claimant was placed on an unpaid leave of absence. The employer told the Commission that the Claimant was placed on an unpaid leave of absence for not complying with their vaccination policy.

[11] The Claimant says he wasn't suspended, but instead was placed on an unpaid leave of absence.

[12] I find the Claimant was suspended from his job because he didn't comply with the employer's vaccination policy. I realize the Claimant argued that he wasn't suspended but instead was placed on an unpaid leave of absence. However, the Claimant's separation was directed by the employer and wasn't initiated by the Claimant. On this matter, I agree with the Commission that when the **employer directs** the separation due to a claimant's non-compliance with the vaccination policy this would be a suspension and not a leave of absence. (GD4).

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

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

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ 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.⁴

[15] 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 or let go because of that.⁵

[16] 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.⁶

[17] The Commission says there was misconduct because the Claimant was well aware of the employer's mandatory vaccine policy and the consequences of non-compliance.

[18] The Claimant says there was no misconduct because there wasn't any improper behaviour on his part.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was aware of the consequences for not complying with the employer's vaccination policy (GD3-17 and GD3-52). Furthermore, the Commission provided a

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

copy of the employer's mandatory vaccination practice (policy) which stated that employees who didn't attest to their vaccination status would be considered unwilling to be fully vaccinated and placed on leave without pay after November 26, 2021 (GD3-55). I realize the Claimant argued there wasn't any improper behaviour on his part and no misconduct. However, I must apply the legal test for misconduct established in the case law. In short, the Commission has proven the Claimant was aware of the consequences for not complying with the employer's vaccination policy.

Additional Testimony from the Claimant

[20] I recognize the Claimant further testified that the employer never responded to his request for a religious exemption. I realize the Claimant was frustrated and unhappy about this situation. Nevertheless, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. Other avenues existed for the Claimant to make these arguments.⁷

Submissions from the Claimant's Representative

[21] I realize the Claimant's representative argued that the employer didn't have a vaccination policy but a "practice" and this couldn't override "the law." Nevertheless, the employer referred to their vaccination practice as a policy to the Commission (GD3-26). Furthermore, whether the employer described their vaccination requirements as a policy or practice the Claimant was requested to comply with these requirements and he made a personal choice not to comply.

[22] I further realize the Claimant's representative cited a recent decision from the General Division of the Social Security Tribunal where a Tribunal Member allowed an appeal on an issue of misconduct (GD-22-1889). On this matter, I wish to emphasize that General Division decisions were not legal precedent and I'm not bound by these decisions.

⁷ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

[23] Finally, the Claimant's representative submitted that the Claimant had a "right to an exemption" and the employer had a duty to accommodate. However, as mentioned the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction.⁸ The only issue before me was whether the Claimant was suspended from his job because of misconduct. On this matter I must apply the legal test for misconduct. In other words, I cannot ignore the law even in the most sympathetic cases.⁹

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

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

Conclusion

[25] 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 November 29, 2021.

[26] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section

⁸ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

⁹ *Knee v Canada (Attorney General)*, 2011 FCA 301.