



[TRANSLATION]

Citation: *ML v Canada Employment Insurance Commission*, 2023 SST 740

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

Decision

Appellant: M. L.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (499344) dated August 1, 2022 (issued by Service Canada)

Tribunal member: Josée Langlois
Type of hearing: Teleconference
Hearing date: February 27, 2023
Hearing participant: Appellant
Decision date: March 3, 2023
File number : GE-22-2975

Decision

[1] The appeal is dismissed.

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

Overview

[3] The Appellant worked as a helicopter pilot for X. He stopped working on November 30, 2021, after failing to provide a COVID-19 vaccination attestation as required by the employer's vaccination policy.

[4] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant was let go because of misconduct. Because of this, it could not pay him benefits.

[5] The Appellant disagrees with the Commission's decision. He admits that he didn't provide the employer with a COVID-19 vaccination attestation. But, he explains that the nature of his occupation requires proper medical records and that getting vaccinated against COVID-19 was too risky for him. In addition, he says that he never committed misconduct on the job.

[6] I have to determine whether the Appellant was let go because of misconduct.

Issues

[7] Did the Appellant provide the employer with a COVID-19 vaccination attestation as required by the vaccination policy?

¹ Section 30 of the *Employment Insurance Act* (Act) says that claimants who are let go because of misconduct aren't entitled to EI benefits.

[8] If so, does this amount to misconduct?

Analysis

[9] To answer the question of whether the Appellant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the *Employment Insurance Act* (Act) considers that reason to be misconduct.

Did the Appellant provide the employer with a COVID-19 vaccination attestation as required by the vaccination policy?

[10] I find that the Appellant was let go because he didn't provide the COVID-19 vaccination attestation required by the employer.

[11] The Record of Employment that the employer issued indicates that the reason the Appellant stopped working was dismissal or suspension.

[12] On his application for benefits, the Appellant indicated that he was let go for refusing to comply with the employer's vaccination policy.² At the hearing, he explained that the vaccination attestation required by the employer could not prove that he wasn't vaccinated. He didn't want to get vaccinated against COVID-19 and had no vaccination attestation to provide to the employer.

[13] The Appellant and the Commission agree on why the Appellant stopped working.

[14] I find that the Appellant didn't provide the vaccination attestation required by the employer and that he acted as the employer says he did.

Is the reason for the Appellant's dismissal misconduct under the Act?

[15] A worker who is let go for misconduct isn't entitled to EI benefits.³

² GD3-11.

³ Section 30 of the Act.

[16] The reason for the Appellant's dismissal is misconduct under the Act. A worker who is suspended from their employment because of their misconduct can't receive EI benefits.

[17] To be misconduct under the Act, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ The Appellant 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 Act.⁶

[18] There is misconduct if the Appellant 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.⁷

[19] The Commission has to prove that the Appellant stopped working 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 Appellant was let go because of misconduct.⁸

[20] On June 6, 2022, the operations manager at the employer told a Commission employee that a vaccination policy had been implemented in November 2021 because of an interim order from the government.⁹ The manager explained that the Government of Canada required pilots to be vaccinated to be able to enter the secure area of an airport and that Transport Canada had issued a directive in connection with this. For example, the Appellant was supposed to go to Chile but was unable to because he could not enter the secure area of the airport.

⁴ See *Mishibinijima v Attorney General of Canada*, 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.

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

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

⁹ GD3-26 to GD3-34.

[21] The manager also said that the vaccination policy had been explained orally to employees in October 2021 and that the same information had been provided in writing in November 2021. On this point, employees were told in an email that he [sic] had to provide a COVID-19 vaccination attestation by November 15, 2021, to be able to continue working.¹⁰

[22] On August 8, 2022, the manager explained to the Commission that he had spoken at length with the Appellant, but the latter categorically refused to get vaccinated.

[23] Since the Appellant had clearly stated his intention not to get vaccinated, the employer had no choice but to let him go. The manager explained that the Appellant would have been suspended if he had intended to get vaccinated later. He also said that before the COVID-19 pandemic, pilots had to be vaccinated—for example, against fever—to be able to land in certain countries.

[24] The manager also explained that a month after letting the Appellant go, he called him back to offer him a job as a mechanic (which didn't require a vaccination attestation). Training was offered, but the Appellant declined.

[25] The Appellant explains that he refused to get vaccinated because the COVID-19 vaccine was experimental and the long-term side effects weren't known. He argues that he exercised his right to free and informed consent. He explains that he could have lost his pilot's licence if he had experienced serious side effects. To keep his licence, he has to visit the doctor regularly, and given the many cases of allergies to the vaccine and of myocarditis after COVID-19 vaccination, he didn't want to get the vaccine. But, he says that he didn't ask the employer for a medical exemption.

[26] The Appellant admits that he was told about the vaccination policy and the consequences of not complying with it. He knew he would be let go if he didn't provide a COVID-19 vaccination attestation. But, he argues that whether to get vaccinated is a

¹⁰ GD3-25.

personal choice, and he wonders, from an ethical standpoint, whether an employer can force employees to get vaccinated. He says that the employer unilaterally changed the conditions of employment by implementing this policy. He explains that as a helicopter pilots, he needed to land at airports mostly for fuel.¹¹

[27] The Appellant also raises issues related to the *Canadian Charter of Rights and Freedoms*. But, he says he isn't challenging a provision of the Act, and he understands that his questions can be addressed in other forums. He explains that he didn't commit misconduct on the job and that he feared the side effects of the vaccine.

[28] The Commission says that the employer has the right to establish rules, directives, or policies in an employment relationship and that refusing to obey or comply with a directive may constitute misconduct under the Act. Specifically, the Commission says that the Appellant wilfully refused to comply with the employer's vaccination policy and that this amounts to misconduct.

[29] The Commission also says that the Tribunal doesn't have jurisdiction to determine whether the employer acted fairly or reasonably when it implemented its mandatory vaccination policy.¹²

[30] I agree with the Commission. Because he refused to comply with the employer's policy, the Appellant could not continue working. It isn't a matter of determining whether the Appellant was entitled to consent to getting the COVID-19 vaccine. In this case, the Appellant chose not to consent to getting the COVID-19 vaccine. But he knew there would be consequences if he didn't.

[31] I have reviewed the documents that the Appellant sent before the hearing, particularly the decision in *AL v Canada Employment Insurance Commission*.¹³ In that particular case, the employees' collective agreement had been renegotiated to include a mandatory vaccination policy, which isn't what happened here. I also note that the

¹¹ GD3-35.

¹² *Paradis v Attorney General of Canada*, 2016 FC 1282 at para 31.

¹³ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

Commission appealed to the Tribunal's Appeal Division in that file and was given permission to appeal on February 9, 2023.

[32] My role is to determine whether the Appellant committed misconduct under the Act when he refused to comply with the employer's mandatory COVID-19 vaccination policy. I don't have to consider the employer's behaviour to determine whether such a policy is justified. On this point, the Federal Court of Appeal has held that the Tribunal has to focus on the claimant's conduct, not the employer's. There will be misconduct where a **claimant knew or ought to have known that their conduct was such as to impair the performance of the duties owed to their employer and that, as a result, dismissal was a real possibility.**¹⁴

[33] My role also isn't to determine whether the dismissal was an appropriate measure. In a recent decision, the Federal Court of Appeal said that the Tribunal has "an important, but narrow and specific role to play in the legal system."¹⁵ It said that the Tribunal doesn't have jurisdiction to rule on the legitimacy or legality of government policies and directives meant to combat the COVID-19 pandemic and that there are other ways for a claimant to challenge these policies and directives. It also said that it is reasonable for the Tribunal not to address these arguments and that the courts won't intervene in the Tribunal's decisions on this basis.

[34] Although I understand the Appellant's explanations about the choices he made, the employer implemented a policy and required employees to be vaccinated against COVID-19. The policy provided for accommodation, and an employee could ask for a vaccine exemption, specifically for medical or religious reasons. If there were a risk to his health, the Appellant could see his doctor and ask his employer to exempt him from providing the COVID-19 attestation for medical reasons.

[35] The employer has responsibilities when it comes to the health and safety of its employees, and it can implement related directives or policies. My role isn't to determine

¹⁴ *Nelson v Attorney General of Canada*, 2019 FCA 222.

¹⁵ *Cecchetto v Attorney General of Canada*, 2023 FC 102.

whether the suspension was an appropriate measure or whether the employer should have proposed an alternative to dismissal.¹⁶ Under the Act, when an employee deliberately violates a directive from their employer, this behaviour gets in the way of carrying out their duties toward their employer.

[36] In light of this, the Appellant acted wilfully and breached his duties toward his employer. By going against the employer's COVID-19 vaccination policy, he committed misconduct under the Act. He knew he could be let go if he didn't provide a COVID-19 vaccination attestation, and he chose not to do so. He did this wilfully.

[37] In addition, wrongful intent doesn't have to be proven to find misconduct under the Act. In other words, I don't have to determine whether the Appellant did something wrong.

[38] The Appellant was let go for not following the employer's rules; he refused to comply with the vaccination policy, which was mandatory for all employees (unless they provided a medical or religious exemption). The Appellant's refusal to follow the employer's rules was a breach of his job duties.

[39] The Appellant knew the rules and decided not to follow them. This wilful act amounts to misconduct.

So, did the Appellant lose his job because of misconduct?

[40] The Appellant can't get regular benefits if he was let go after committing misconduct. When an employee doesn't follow their employer's rules, they can assume they will be suspended or let go.

[41] Based on my findings above, I find that the Appellant acted as the employer says he did and that his refusal to comply with the employer's mandatory vaccination policy amounts to misconduct under the Act.

¹⁶ *Attorney General of Canada v Marion*, 2002 FCA 185 (CanLII).

Conclusion

[42] The Commission has proven that the Appellant stopped working because of misconduct. Because of this, the Appellant can't receive EI benefits.

[43] This means that the appeal is dismissed.

Josée Langlois

Member, General Division – Employment Insurance Section