



Citation: *DS v Canada Employment Insurance Commission*, 2022 SST 1742

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 (484487) dated June 16, 2022
(issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: December 21, 2022

Hearing participant: Appellant

Decision date: December 30, 2022

File number: GE-22-2302

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 this). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits for the period he was unable to work due to his suspension (from November 22, 2021 to June 19, 2022).¹

Overview

[3] D.S. is the Claimant in this case. He worked as a pilot for X. The employer put the Claimant on an unpaid leave of absence on November 22, 2021 because they say he did not comply with the mandatory vaccination policy at work.² The Claimant then applied for EI regular benefits.³

[4] The Commission first decided that the Claimant was not entitled to receive EI regular benefits because he voluntarily left his employment and was not available for work. The Claimant asked the Commission to reconsider their decision. He argued that the unpaid leave of absence was imposed by the employer and noted he found part-time work elsewhere as a pilot.⁴

[5] The Commission changed their decision on reconsideration. First, they agreed that the Claimant was available for work and reversed their decision on this issue. However, they also decided that the Claimant did not voluntarily leave his job, but that he was suspended for misconduct instead.⁵ They imposed a disentitlement to EI benefits for misconduct.⁶

¹ See section 31 of the *Employment Insurance Act* (Act). The Claimant he returned to work for his employer around June 20, 2022.

² See unpaid leave email dated November 22, 2022 at GD3-32 to GD3-33.

³ See application for EI benefits at GD3-3 to GD3-13.

⁴ See reconsideration request at GD3-22 to GD3-23.

⁵ See reconsideration decision at GD3-39 to GD3-40.

⁶ See section 31 of the Act.

[6] The Claimant argues that he was constructively dismissed and that he expected the employer to respect the terms of his employment contract and collective agreement.⁷ As well, he does not want to share his private medical information with his employer, namely his vaccination status for covid19.

Issue

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

Analysis

[8] The law says that you cannot get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.⁸

[9] 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 lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant stop working?

[10] I find that the Claimant stopped working because he was put an unpaid leave of absence effective on November 22, 2021.⁹ The reason for the unpaid leave of absence was because the Claimant was not willing to provide proof of vaccination for covid19 to his employer by the deadline set out in the policy. This conduct is not disputed by the Claimant.

⁷ See notice of appeal at GD2-1 to GD2-10.

⁸ See sections 30 and 31 of the Act.

⁹ See unpaid leave email dated November 22, 2022 at GD3-32 to GD3-33; record of employment at GD3-14 to GD3-15 and employer's discussion with the Commission at supplementary record of claim (SROC) at GD3-16.

[11] I was not persuaded by the Claimant's argument that there was a significant change in his duties, or undue pressure by the employer to leave his employment. The Claimant relies on section in law that deals with voluntary leaving an employment and the *Digest of Benefit Entitlement Principles* (Digest).¹⁰

[12] I find that the section in law referred to by the Claimant is not applicable in this case. That particular section imposes a disqualification to EI benefits if an individual *voluntarily* leaves their employment without just cause. I note that Digest is a reference tool published by the Commission, but it is not law.

[13] The evidence in this case shows that the Claimant did not voluntarily leave his employment, but rather the employer put him on an unpaid leave of absence. The Claimant did not have a choice. The employer told him that he could not access airport property and he had to return his equipment (phone, iPad, keys and headset).

[14] I find that the appropriate section in law is suspension for misconduct.¹¹ This results in a disentitlement to EI benefits until certain conditions are met, such as the period of suspension expires, or one loses or voluntarily leave their employment, or they accumulate enough hours with another employer.¹² The Claimant was put on an unpaid leave of absence and was prevented from returning to work for non-compliance with the policy. However, he did return to work around June 20, 2021, so the suspension to EI benefits is only applicable for the period he was suspended.¹³

[15] The Claimant argues that the suspension is considered a disciplinary measure that the employer can impose based on the collective agreement. He argues that the employer was never allowed to impose an unpaid leave of absence because he did not ask or agree to it.

¹⁰ See section 29(c)(vii)(ix) of the Act and chapter 6.5.10 and 6.5.14 of the Digest.

¹¹ See section 31 of the Act.

¹² See section 31(a)(b)(c) of the Act.

¹³ See section 31(a) of the Act.

[16] I understand that the Claimant disagrees with the employer's choice to put him on an unpaid leave of absence without his consent. However, his remedy is to file a grievance and follow the labour arbitration process (or courts if applicable) to address this issue and employer's conduct.

[17] The law is clear - whether the Claimant was wrongfully suspended or wrongfully terminated by his employer are not issues relevant to the misconduct test based on the *Employment Insurance Act*.¹⁴ I note that the Claimant has already file a grievance and is expecting to go to arbitration in January 2023.

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

[18] The *Employment Insurance Act* (Act) does not say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal 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.

[19] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.¹⁶

[20] The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.¹⁷

[21] 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.¹⁸

¹⁴ See *Canada (Attorney General) v Marion*, 2002 FCA 185 and *Canada (Attorney General of Canada) v McNamara*, 2007 FCA 107.

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁷ See *Attorney General of Canada v Secours*, A-352-94.

¹⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[22] The law does not say I have to consider how the employer behaved.¹⁹ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.²⁰

[23] 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 whether the employer should have made reasonable arrangements (accommodations) for the Claimant are not for me to decide.²¹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[24] 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.²²

The policy

[25] At the hearing, I asked the Claimant to tell me about the policy.

[26] The Claimant said that he worked for X as a pilot. Part of his job meant that he had to fly into various airports in different cities on a regular basis. His employer introduced a policy (covid19 safe workplace directive) around September 2021. He explained that he was always in compliance with the provincial policy because it was less restrictive (it allowed employees to either be fully vaccinated or to provide proof of a negative covid19 test). He noted that he was in compliance with that policy because he agreed to do covid19 testing.

¹⁹ See section 30 of the Act.

²⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²² See *Minister of Employment and Immigration v Bartone*, A-369-88.

[27] The Claimant said that things changed at work when the federal policy was introduced around October 6, 2021 for aviation services.²³ He said that Transport Canada imposed an Interim Order that mandated employers to ensure their employees had provided proof of full vaccination for covid19 in order to fly into various airports. Unlike the provincial policy, there was no option to do testing for covid19 with the federal policy.

[28] Because of this, the employer put the Claimant on an unpaid leave of absence on November 22, 2021 as he was not in compliance with the federal policy and had not provided proof of full vaccination for covid19.

[29] For ease of reference in this decision, I will refer to the federal policy as the “policy” since that was the policy which led his employer to putting him on an unpaid leave of absence for non-compliance.

[30] A copy of the policy was emailed to the Claimant and other employees on November 12, 2021.²⁴ I have summarized the relevant parts of the policy (emphasis added is mine):

- a) **As of November 15, 2021**, all relevant aviation services employees must receive a first dose of covid19 vaccine, unless exempted
- b) Employees who are **non-compliant as of November 15, 2021** will not be able to attend an aerodrome property and will be contacted by management to discuss their assigned duties
- c) **As of November 22, 2021**, anyone who has not received a first dose of a covid19 vaccine or who has not been approved for a medical or religious exemption **may be placed on an unpaid leave and may be disciplined up to and including dismissal**

²³ The Claimant said this was based on an “*Interim Order Respecting Requirements for Civil Aviation Due to COVID-19, No.43*” issued by Transport Canada for federally regulated industries, which includes the aviation section.

²⁴ See policy at GD3-29 to GD3-31.

- d) Employees who are seeking a **medical or religious exemption** must submit the request to their manager
- e) **Proof of vaccination** will be confirmed through the **attestation process** in “WIN” as per existing procedures
- f) Aviation service employees are not required to show proof of vaccination when entering aviation services facilities as this has been obtained through the attestation process

[31] I find that the Commission has proven that there was misconduct for the following reasons.

[32] First, I find that the policy was communicated to the Claimant and that he had enough time to comply. The Claimant remembered getting a few emails and being forwarded a copy of the federal policy.

[33] I acknowledge that the evidence shows there was a short timeline from when the policy was emailed to him on November 12, 2021 requiring him to provide proof of a first vaccine dose by November 15, 2021.²⁵ However, the policy did allow some extra time, up to November 22, 2021 to get a first dose to avoid an unpaid leave of absence.

[34] In my view, the Claimant had approximately ten days and this was enough time to obtain the first vaccine dose and provide proof of vaccination. Even if it wasn't enough time, the Claimant could have asked his employer for an extension.

[35] Second, I find that the Claimant wilfully and consciously chose not to comply with the policy for his own reasons. He thought about whether to comply or not and made a personal choice to not comply. Specifically, he chose not to provide his employer with his covid19 vaccination status because he felt it was private information.

²⁵ See GD3-29 to

[36] The Claimant agreed that he was not exempt from the policy. He was aware the policy provided for medical and religious exemption, but did not ask his employer for an exemption.

[37] I note that even if an employee disagrees with the employer's policy, it doesn't mean that they don't have to follow the policy, or that no consequences will flow from the decision not to comply with the policy.

[38] I accept that the Claimant did not have wrongful intent in this case, but his choice to not comply with the policy was still misconduct. The Federal Court of Appeal has already said that a deliberate violation of the employer's policy is considered misconduct based on the Act.²⁶

[39] Third, I find that the Claimant knew or ought to have known that by not complying with the policy would lead to an unpaid leave of absence on November 22, 2021. The Claimant agreed that he knew what he had to do under the vaccination policy and what would happen if he did not follow it by the deadline.

[40] The Federal Court has said that misconduct can include a breach of an express or implied duty in an employment contract.²⁷ So, even if vaccination for covid19 was not an express duty of his employment, it became one when the employer decided to impose a policy requiring employees to attest to their vaccination status and provide proof of vaccination for covid19 (unless exempted).

[41] I generally accept that employers can choose to implement policies at work. In this particular case, the employer was required to follow the federal policy. The Claimant was unable to work as a pilot (for this employer) because he could not fly into various airports unless he had provided proof of covid19 vaccination.

²⁶ See *Canada (Attorney General) v Bellavance*, 2005 FCA 87; *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

²⁷ See *Canada (Attorney General) v Brissette* 1993 FCA 3020 and *Canada (Attorney General) v Lemire*, 2010 FCA 314.

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

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

[43] This is because the Claimant's actions led to his suspension. He acted deliberately. He knew that refusing to provide proof of vaccination by the deadline was likely to cause this.

What about the Claimant's other arguments?

[44] The Claimant raised other arguments to support his case, including some of the following:

- a) There was a unilateral and significant change to his duties
- b) The employer breached the collective agreement when he was put on an unpaid leave of absence
- c) He expected the employer to abide by the terms of his employment contract
- d) He was constructively dismissed by his employer
- e) The employer was not willing to consider alternative work or other types of accommodation
- f) There was undue pressure by the employer because they withheld some payments owing to him
- g) He remained medically fit to fly planes

[45] I do not have the authority to determine whether the policy was reasonable, or if the Claimant should have been accommodated by the employer, or whether the penalty imposed by the employer should have been different.²⁸

[46] I can only decide whether what the Claimant did or failed to do is misconduct under the Act. I have already decided that the Claimant's conduct does amount to misconduct. The Claimant's recourse is to pursue an action in court, or any other Tribunal to get the remedy he is seeking.

[47] The Claimant testified that he is part of a union and has already filed a grievance. As noted above, the Claimant said he is expecting his case to go to labour arbitration in late January 2023.

Conclusion

[48] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[49] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

²⁸ See *Canada (Attorney General) v Marion*, 2002 FCA 185; *Canada (Attorney General of Canada) v McNamara*, 2007 FCA 107.