Citation: *KD v Canada Employment Insurance Commission*, 2023 SST 519

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	K. D.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (525772) dated September 1, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	February 1, 2023
Hearing participant:	Appellant
Decision date:	February 27, 2023
File number:	GE-22-3063

Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant suspended his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits starting March 5, 2022.[1]

[3] The modification referred to above is that I am changing the reason for not paying benefits effective May 29, 2022. This change is because the Appellant resigned June 3, 2022.[2]

[4] The disentitlement ends June 2, 2022. Disentitlements due to suspensions are imposed until a claimant voluntarily leaves his employment. What then needs to be determined is if the Appellant had just cause for leaving the employment. If there is no just cause, the person is disqualified from receiving benefits.

[5] I find the Appellant is disqualified starting May 29, 2022, since he left without just cause. This change does not alter the payments of benefits and only changes the reason why no benefits are being paid.

Overview

[6] The Appellant suspended his job. The Commission says the Appellant was suspended because he failed to comply with a mandatory vaccination policy.

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[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 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

[2] Section 30 of the *Employment Insurance Act* says that claimants who voluntarily left any employment without just cause without just cause is disqualified from receiving any benefits. Section 2(1) of the EI Act defines a week to mean, “a period of seven consecutive days beginning on and including Sunday, or any other prescribed period.” This means the effective date of disqualification is the Sunday of the week in which the disqualifying event occurred.

[7] Even though the Appellant doesn't dispute that this happened, he argues it is not misconduct. He did not believe he would be suspended given his situation regarding the religious exemption.

[8] The Commission accepted the reason for the suspension. It decided that the Appellant was suspended from his job because of misconduct. Because of this, the Commission decided that the Appellant was disentitled from receiving EI benefits.

Issue

[9] There are two issues which need to be addressed.

1) Was the Appellant suspended from his job because of misconduct?

2) Did the Appellant voluntarily leave his job on June 3, 2022? If so, did he have just cause in doing so?

Analysis

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

[11] To answer the question regarding the voluntary leave, the Commission must prove that the Appellant voluntarily left his job on June 3, 2022. The burden then shifts to the Appellant to prove he had just cause to voluntary leave his job.

Why was the Appellant suspended?

[12] I find that the Appellant was suspended from his job because did not comply with the mandatory vaccine policy.

[13] The Appellant and the Commission agree on why the Appellant was suspended from his job.

[14] My findings are based on the uncontested evidence before me. Both parties agree.

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

[15] Yes. The reason for the Appellant's suspension is misconduct under the law.

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[3] Misconduct also includes conduct that is so reckless that it is almost wilful.[4] 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 law.[5]

[17] 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.[6]

[18] The Commission has to prove that the Appellant suspended 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 Appellant suspended him from his job because of misconduct.[7]

[19] The Commission says that there was misconduct under the EI Act because the evidence shows:

- the employer had a vaccination policy and communicated that policy to all staff.[8]
- under the vaccination policy the Appellant had to declare his vaccination status, and be fully vaccinated or request get an exemption from his employer (by November 15, 2021)

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[3] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[4] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[5] See *Attorney General of Canada v Secours*, A-352-94.
[6] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[7] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[8] See GD3 page 37 42.

- he knew what he had to do under the policy
- he also knew his employer could suspend him under the policy if he didn't attest to being fully vaccinated (or get an exemption) by the deadline
- he applied for an exemption on religious grounds,[9] but his employer denied his request
- he made a conscious and deliberate personal choice not to get vaccinated by the deadline after his exemption request was denied.
- his employer suspended him because he didn't comply with its vaccination policy

[20] The Appellant says that there was no misconduct because

- he believes he had valid religious exemption.
- His employer had a duty to accommodate him
- He had a valid medical reason to work from home. This dates from 2018. He was in fact teleworking and had no need to attend the office.
- His fundamental rights and freedoms have been violated.
- He has been willing and able to work since the beginning of his suspension.

[21] The evidence in this appeal is consistent and straightforward. I believe and accept the Appellant's evidence and the Commission's evidence.

[22] I have no reason to doubt the Appellant's evidence (what he said to the Commission, wrote in his reconsideration request and appeal notice, and his testimony at the hearing). His evidence is consistent. And there is no evidence that contradicts what he said.

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[9] See GD3 page 28.

[23] I accept the Commission's evidence because it's consistent with the Appellant's evidence. And there is no evidence that contradicts it.

[24] I can only decide whether his conduct is misconduct under the EI Act. I can't make my decision based on other laws.[10] So, I can't consider whether his employer's policy or the penalty it applied to him is reasonable or legal under other laws. This includes considering whether COVID vaccination policies are supported by the scientific evidence about COVID vaccines.

[25] There have also been more recent court cases which support this. In a recent case called *Parmar*,[11] the issue before the Court was whether an employer was allowed to place an employee on an unpaid leave of absence for failing to comply with a mandatory vaccination policy. Ms. Parmar objected to being vaccinated because she was concerned about the long-term efficacy and potential negative health implications.

[26] The Court in that case recognized that it was "extraordinary to enact policy that impacts an employee's bodily integrity" but ruled that the vaccination policy in question was reasonable, given the "extraordinary health challenges posed by the global COVID-19 pandemic." The Court then went on to say:

> [154]. . . [Mandatory vaccination policies] do not force an employee to be vaccinated. What they do force is a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income …

[27] In another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[12] Paragraph 32 has the following:

> [32] While the Applicant is clearly frustrated that none of the decision-makers have addressed what he sees as the fundamental legal or factual issues that he

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[10] See for example the Federal Court of Appeal's decision in *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[11] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.
[12] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

> raises – for example regarding bodily integrity, consent to medical testing, the safety and efficacy of the COVID-19 vaccines or antigen tests – that does not make the decision of the Appeal Division unreasonable. The key problem with the Applicant's argument is that he is criticizing decision-makers for failing to deal with a set of questions they are not, by law, permitted to address.

[28] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights under other laws. The recourse available to an employee would be via a grievance if the employer contravened the collective agreement. The recourse would be via another tribunal or court if the employer contravened his human rights as an example.

[29] I agree the Appellant can decline vaccination. That is his own personal decision. In his case, his reason is religious and medical. This is his right. I also agree the employer has to manage the day-to-day operations of the workplace. This includes developing and applying policies related to health and safety in the workplace.

[30] Based on the evidence, I find that the Commission has proven the Appellant's conduct was misconduct because it has shown that:

- He knew about the vaccination policy.
- He knew about his duty to get fully vaccinated and give proof (or get an exemption) by the deadline.
- He knew that his employer could suspend him if he didn't get vaccinated.
- He consciously, deliberately, or intentionally made a personal decision not to get vaccinated by the deadline.
- He was suspended then terminated from his job because he didn't comply with his employer's vaccination policy.

[31] I understand the Appellant may not agree with this decision. Even so, the Federal Court of Appeal dictates that I can only follow the plain meaning of the law. I can't

rewrite the law or add new things to the law to make an outcome that seems fairer for the Appellant.[13]

Did the Commission prove the Appellant voluntary leave his job on June 3, 2022?

[32] I find the Appellant did resign from his job on June 3, 2022. This is based on the uncontested evidence before me. I see no reason not to come to this conclusion. The Appellant provided this information to the Commission on July 5, 2022.[14] He testimony during the hearing was consistent with this.

Did the Appellant have just cause?

[33] The law says that you are disqualified from receiving benefits if you left your job voluntarily and you didn't have just cause.[15] Having a good reason for leaving a job isn't enough to prove just cause.

[34] The law explains what it means by "just cause." The law says that you have just cause to leave if you had no reasonable alternative to quitting your job when you did. It says that you have to consider all the circumstances.[16]

[35] It is up to the Appellant to prove that he had just cause. He has to prove this on a balance of probabilities. This means that he has to show that it is more likely than not that his only reasonable option was to quit.[17]

[36] After I decide which circumstances apply to the Appellant, he then has to show that he had no reasonable alternative to leaving at that time.[18]

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[13] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.
[14] See GD3 page 27.
[15] Section 30 of the *Employment Insurance Act* (Act) explains this.
[16] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 3; and section 29(c) of the Act.
[17] See *Canada (Attorney General) v White*, 2011 FCA 190 at para 4.
[18] See section 29(c) of the Act.

Circumstances that existed at the time the Appellant quit

[37] The Appellant provided circumstances set out in the law that may apply. Specifically, he was suffering from anxiety and the employer added a new condition of employment. Section 29(c)(xiv) of the Act allows for any other reasonable circumstance to be considered.

[38] I believe the Appellant. There is nothing to contradict this. I find that both these circumstances need to be considered when reviewing reasonable alternatives.

The Appellant had reasonable alternatives

[39] Having determined the Appellant voluntarily left, it is now up to him to prove that he had just cause. I will consider the circumstances that were present at the time the Appellant resigned.

[40] During the hearing, the Appellant testified that:

- He made the irrational choice to quit as he wanted to search for work elsewhere.
- He was suffering from anxiety.
- He did not see the light at the end of tunnel.
- He did not speak to his employer or ask about his rights to search for work elsewhere.
- He did not seek advice from a doctor prior to quitting.

[41] The Commission stated a reasonable alternative would have been to comply with the vaccination policy.[19]

[42] I would add another reasonable alternative to that. I would add that the Appellant could have remained on leave. This was not mentioned by the Commission. Requesting a leave of absence when faced with a dilemma to leave employment needs to be

[19] See GD 4 page 5.

reviewed as a reasonable alternative. In the Appellant's case, he did not need to ask for a leave as one had been forced upon him.

[43] I fail to see why there was a need to resign from the leave. A reasonable alternative would have been to reach out to the employer to determine his rights. The Appellant testified he did not enquire as to his rights to search for work elsewhere. Most employees are free to seek other work even when employed. Unless then are certain clauses in an employment contract, this is a generally accepted principle. The Appellant did not say this was the case for him.

[44] The Commission stated one option would have been to comply with the policy and made reference to his religious beliefs. I do not agree. That does not mean he had just cause.

[45] The fact that the employer did not accept his exemption request after their review does not make his personal beliefs irrelevant.[20] He had already been unemployed for about 3 months for non-compliance with the policy. He obviously feels strongly about his religious beliefs. Many individuals would not accept even starting a job with a vaccine policy. Faced with a newly implemented policy such as this one, I would ague that requesting a leave would be a reasonable alternative. In his case, he was already on leave.

[46] I find the Appellant had reasonable alternatives. He could have remained on leave while searching for work elsewhere.

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

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

[20] As discussed in the misconduct session, the Tribunal has to focus on what a claimant does.

So, did the Appellant have just cause to voluntarily leave his employment?

[48] No. There were reasonable alternatives available to him. The primary one being the option to remain on unpaid leave while searching for work. There was no immediate need to quit.

Conclusion

[49] The Commission has proven that the Appellant suspended his job because of misconduct. Because of this, the Appellant is disentitled until June 3, 2022. He is then disqualified from receiving EI benefits effective May 29, 2022.

[50] This means that the appeal is dismissed with modification.

Marc St-Jules

Member, General Division – Employment Insurance Section