



Citation: *HE v Canada Employment Insurance Commission*, 2023 SST 674

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

## Decision

**Appellant:** H. E.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (526085) dated September 29, 2022 (issued by Service Canada)

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**Tribunal member:** Amanda Pezzutto

**Type of hearing:** In person

**Hearing date:** February 22, 2023

**Hearing participant:** Appellant

**Decision date:** February 28, 2023

**File number:** GE-22-3432

## Decision

[1] H. E. is the Appellant. The Canada Employment Insurance Commission (Commission) says he can't get Employment Insurance (EI) benefits. The Commission says his employer suspended him for misconduct. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Appellant's appeal. I find that the reason his employer suspended him is misconduct under the meaning of the law. This means he can't get EI benefits.

## Overview

[3] The Appellant's employer introduced a COVID-19 vaccination policy. Under the policy, the employer expected all employees to show proof of vaccination against COVID-19. Employees could ask for an exemption from the policy for certain reasons. The Appellant didn't give his employer proof of vaccination against COVID-19 and the employer didn't exempt him from the policy. So, the employer put the Appellant on an unpaid leave of absence.

[4] The Commission says this means that his employer suspended him. The Commission says the reason for the suspension is misconduct under the law. The Commission says this is because the Appellant knew about the employer's policy and knew he couldn't keep working if he didn't follow the policy. The Commission says he acted deliberately when he didn't follow the employer's policy.

[5] The Appellant disagrees. He says the employer should have accommodated him. He says he couldn't get vaccinated against COVID-19 for medical reasons.

## Issue

[6] Did the Appellant lose his job because of misconduct?

## **Analysis**

[7] To answer the question of whether the Appellant lost job 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 law considers that reason to be misconduct.

### **Why did the Appellant stop working?**

[8] The Commission says I should treat the Appellant's loss of employment as a suspension. And the Commission says his employer suspended him because he didn't follow its COVID-19 policy.

[9] The Appellant agrees that he stopped working because of his employer's COVID-19 policy. But he says that his employer and the Commission have described his loss of employment in different ways. He doesn't think I should treat his loss of employment as a suspension.

[10] I agree with the Commission. I find that the Appellant stopped working because his employer suspended him. And I find that his employer suspended him because he didn't follow its COVID-19 vaccination policy.

[11] At the hearing, I asked the Appellant for more information about why he stopped working. He said he didn't choose to take a leave of absence from work. He also said he didn't stop working because of a shortage of work. He said his employer put him on an unpaid leave of absence, but he didn't want to stop working.

[12] The Appellant said his employer hasn't told him that he has been fired. He said he hasn't returned to work yet but hopes he can return to work soon.

[13] I believe the Appellant. I don't think he chose to leave his job. I don't think he stopped working because of a shortage of work. I think he stopped working because his employer told him that he couldn't return to work. The employer hasn't fired him, and the Appellant expects to return to work. So, I find that this means that the Appellant stopped working because of a suspension.

[14] Both the Appellant and the Commission agree that the employer suspended the Appellant because of its COVID-19 policy. They both agree that the Appellant didn't follow the employer's policy, and that this is the reason for the suspension. There isn't any evidence in the appeal file that tells me the Appellant stopped working for any other reason.

[15] So now I must decide if the reason for the Appellant's suspension is misconduct under the meaning of the law.

### **Is the reason for the Appellant's suspension misconduct under the law?**

[16] I find that the Appellant stopped working because of misconduct.

[17] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>1</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>2</sup> 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.<sup>3</sup>

[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.<sup>4</sup>

[19] The Commission has to prove that the Appellant lost 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 lost his job because of misconduct.<sup>5</sup>

[20] The Commission says that the Appellant stopped working because of misconduct. The Commission says that the Appellant knew about his employer's

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<sup>1</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>2</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>3</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

<sup>5</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

COVID-19 vaccination policy. He knew the employer would suspend him if he didn't follow the policy. But the Commission says the Appellant acted deliberately and decided not to follow the policy. So, the Commission says the reason for his suspension is misconduct.

[21] The Appellant disagrees. He says he has medical reasons for refusing the COVID-19 vaccination. He says his employer should have accommodated him and given him an exemption from the policy.

[22] I agree with the Commission. I find that the Appellant stopped working because of misconduct.

[23] The Appellant and the Commission agree about most of the basic facts in this appeal.

[24] The Appellant's employer introduced a COVID-19 vaccination policy. Under the policy, the employer expected all employees to show proof of vaccination against COVID-19. The deadline for following the policy was January 10, 2022. The policy said that the employer would put employees on unpaid leave if they didn't follow the policy.

[25] The Appellant didn't show proof of vaccination by the deadline. At the hearing, he said he talked to his supervisor about asking for an exemption. He said she wasn't very helpful. But he agreed that he knew his employer hadn't given him an exemption from the policy. So, when the deadline came, the Appellant didn't have an exemption from the policy and he hadn't shown his employer proof of vaccination.

[26] There isn't any dispute about the facts in this appeal. So I accept the above facts as true. But this means that the reason for the Appellant's suspension is misconduct under the meaning of the law. This is because:

- The Appellant knew about the employer's COVID-19 vaccination policy.
- He knew the employer expected him to show proof of vaccination or have an approved exemption by the deadline of January 10, 2022.

- He knew the employer would suspend him if he didn't follow the COVID-19 vaccination policy.
- He acted deliberately and chose not to follow the employer's COVID-19 vaccination policy.
- His actions – failing to follow the COVID-19 vaccination policy – led directly to his suspension.

[27] Most of the Appellant's arguments are about his employer's exemption process. He says that the process was confusing and the employer didn't give him good information about how to ask for an exemption. He says that his employer could have accommodated him by letting him test regularly and wear a mask. He says he feels like his employer discriminated against him.

[28] But it isn't my role to decide if his employer acted fairly by introduced a COVID-19 vaccination policy. I can't consider whether his employer should have given him an exemption from the policy. I can't look at whether his employer should have given him alternatives to vaccination. This is because case law says I can't consider these kinds of issues. I can only look at whether the Appellant stopped working because of misconduct under the meaning of the *Employment Insurance Act*.<sup>6</sup>

[29] And in this case, I find that the reason the Appellant stopped working is misconduct under the meaning of the law.

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<sup>6</sup> See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34. Also see *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

## **Conclusion**

[30] I am dismissing the Appellant's appeal. I find that he stopped working because his employer suspended him. I find that the reason for his suspension is misconduct under the meaning of the law. This means he can't get EI benefits during his suspension.

Amanda Pezzutto

Member, General Division – Employment Insurance Section