



Citation: *PT v Canada Employment Insurance Commission*, 2023 SST 844

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

Decision

Appellant: P. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decisions (557012 and 549305) dated November 29, 2022 (issued by Service Canada)

Tribunal member: Benson Cowan

Type of hearing: Teleconference

Hearing date: April 11, 2023

Hearing participant: Appellant

Decision date: May 3, 2023

File numbers: GE-23-154 and GE-23-155

Decision

[1] The appeal is allowed in part.

[2] The Appellant refused to disclose his COVID-19 vaccination status to his employer. The Canada Employment Insurance Commission (Commission) has proven that the Appellant knew this could get him suspended on December 13, 2021—his employer’s vaccination policy was very clear about this. This means that the Appellant was disentitled to benefits while he was suspended.

[3] However, the Commission has not proven that the Appellant knew or should have known he could lose his job on April 1, 2022, because of his actions - the policy did not say anything about that. Because of this, I am allowing the appeal on the issue of disqualification. The Appellant is not disqualified for losing his job because of misconduct.

[4] Lastly, the Appellant has not shown that he had good cause for the delay in applying for Employment Insurance (EI) benefits. In other words, he has not given an explanation that the law accepts. This means that his application cannot be treated as though it was made earlier.¹

Overview

[5] There are three issues in this appeal:

- Was the Appellant suspended because of misconduct under the law?
- Did the Appellant lose his job because of misconduct under the law?
- Did the Appellant have good cause for not applying for benefits earlier?

[6] There were originally two appeals—one dealing with the Appellant’s suspension and losing his job and the other with his late application. I joined the appeals and held

¹ Section 10(4) of the *Employment Insurance Act* (Act) uses the term “initial claim” when talking about an application.

one hearing for all the issues. This decision addresses all the issues in both original appeals.

Analysis

Did the Appellant get suspended and lose his job because of misconduct?

[7] The law says that you cannot get EI benefits if you stop working because of misconduct. This includes getting suspended from or losing your job.²

[8] The *Employment Insurance Act* (Act) uses the word “misconduct.” This is unfortunate. The word “misconduct” suggests that the person has done something wrong. That is not the case. It just means that the person did something that they knew or should have known could cause them to be suspended or lose their job.

[9] To answer the question of whether the Appellant was suspended and then lost his job because of misconduct, I have to decide two things. First, I have to determine the reason he was suspended and the reason he lost his job. Then, I have to determine whether the law considers those reasons to be misconduct.

– Why did the Appellant get suspended and then lose his job?

[10] I find that the Appellant was suspended on December 13, 2021, because he went against his employer’s COVID-19 vaccination policy.

[11] While the Appellant raised many concerns and criticisms about the terms and application of the vaccination policy, he admits that he was suspended for not following the policy. Specifically, he did not disclose his vaccination status.

[12] The Commission takes the same position. It says that the employer placed the Appellant on unpaid leave for not following its vaccination policy.

² See sections 30 and 31 of the Act.

[13] I also find that the Appellant lost his job on April 1, 2022, for not following the employer's vaccination policy.

[14] The Appellant's account of how he lost his job again raised a number of his concerns about what steps his employer took and how it implemented its policy. But, again, as far as he was aware, his continued refusal to follow the policy was the reason he lost his job.

[15] The Commission agrees that the Appellant lost his job because he went against the policy. His was on a fixed-term contract that expired on April 1, 2022. The evidence from his employer is clear and uncontested that his contract would have been renewed if he had disclosed his vaccination status. The employer says it did not issue a letter saying so to the Appellant.

– **Is the reason the Appellant got suspended and the reason he lost his job misconduct under the law?**

[16] I find that the reason for the Appellant's suspension is misconduct under the law. But as for his losing his job, his actions did not meet the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[17] The Act does not say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the reason a person lost their job is misconduct under the Act. It sets out the legal test for misconduct.

[18] As I said, it is unfortunate that the Act uses the word "misconduct." Case law makes it clear that a person does not have to have wrongful intent (to mean to be doing something wrong) for their behaviour to be misconduct.³ But the normal meaning of "misconduct" suggests wrongful actions or intent. The Appellant raised concerns about the use of that word. He said it made him feel that the process was not fair. While I sympathize, I must apply the law the way it is written.

³ See *Attorney General of Canada v Secours*, A-352-94.

[19] Case law says that, to be misconduct, the conduct has to be wilful (in other words, conscious, deliberate, or intentional).⁴ As I told the Appellant at the hearing, there is misconduct if he knew or should have known that his conduct could get in the way of carrying out his duties towards his employer and that there was a real possibility of being suspended or losing his job because of that.⁵

[20] I must focus on the Act only. I cannot make any decision about whether the Appellant has other options under other laws. The employer may have wrongfully dismissed him or may have failed to make reasonable arrangements (accommodations) for him, but these are not issues that I can address here.⁶ I can consider only one thing: whether what the Appellant did is misconduct under the Act.

[21] The Appellant worked for a federal agency. On October 6, 2021, the Government of Canada implemented a policy on COVID-19 vaccination.⁷ It applied to employees of the agency where the Appellant worked, whether they worked on site or remotely. The Appellant fell in the latter group.

[22] The policy required employees to disclose their vaccination status. Employees who were not willing to be vaccinated or chose not to disclose their vaccination status by the deadline had to take an online training course on COVID-19 vaccination. Two weeks after the deadline, if the employee's vaccination status had not changed or if they still refused to disclose their status, the employer was required to place employees on administrative leave without pay.⁸

[23] The Commission says that the employer clearly told all affected employees about the policy and that the Appellant knew he could lose his job if he did not follow it. He was suspended and then lost his job as a direct result of his refusal to disclose his vaccination status.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

⁶ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁷ See GD3-110 (GE-23-154).

⁸ See GD3-115 (GE-23-154).

[24] The Appellant was aware of the vaccination policy. He spoke in detail about his concerns over how it was unfair. He says that he found the circumstances of its introduction political and suspicious. He read media reports and did some research about COVID-19 vaccines. He felt that the policy and the information provided about it were incomplete and perhaps dishonest.

[25] The Appellant also felt that getting vaccinated was unnecessary. He was working from home and was told he would do so until at least 2025. He did not ask for an accommodation because he did not think he had a religious or medical basis to request one. He contacted his union, but it told him that it would not challenge the vaccination policy.

[26] The Appellant had some valid criticisms of how the employer implemented the policy. There was clearly a lot of confusion, some things were hurried, and some communication was less than perfect. But despite all of that, and despite all the other concerns that the Appellant had about the vaccine and whether it was fair to require him to disclose his vaccination status, the terms of the policy were clear. The Appellant knew that he would be suspended if he failed to disclose his vaccination status.

[27] But once he was suspended, it was not clear that he could lose his job for not following the policy. The policy did not say anything about that. It only mentioned suspension. Based on the terms of the policy, the Appellant would have no reason to think he could lose his job for not disclosing his vaccination status. According to him, his manager told him that the suspension would not affect his standing with the employer.⁹

[28] At the hearing, the Appellant said that once he was suspended, he expected that the policy might be changed to recognize that he was working from home. He thought that it might be revoked and that he would be called back. He thought the situation would change. He did not think that he would lose his job.

⁹ See GD3-40 (GE-23-154).

[29] The Commission interviewed the Appellant's manager in October 2022.¹⁰ She said the Appellant still refused to disclose his status when they spoke on the phone in March 2022, while he was suspended. She said she did not tell him he was going to be terminated. She specifically avoided using that word.

[30] The manager told the Commission that the Appellant's contract ended on April 1, 2022. It was not renewed because he was unwilling to disclose his status. This was, she said, a requirement to extend his contract. They were both clear that this was the only reason for the contract not being extended. She said that no termination letter was sent because it was simply a non-renewal of the contract.

[31] There is no evidence at all that the employer ever told the Appellant that his contract was not going to be extended before the March 2022 phone call. There is no evidence that the contract addressed this issue. And, as discussed above, the policy said nothing about the status of employees on fixed-term contracts. It only said that employees who did not disclose their status would be suspended.

[32] The Appellant remembers the phone call differently. He says he told his manager that he would not disclose to an employer whether he had HIV or an STD, and he did not feel that disclosing his COVID-19 vaccination status was any different. He was then told that he was being let go. He says that they told him on the phone that he was being let go immediately but that he was later told the termination would take effect when his contract expired.

[33] I find that the Appellant was never told he likely lost his job for refusing to disclose his vaccination status. Neither account of the March 2022 phone call suggests that the Appellant was told that his continued refusal to disclose his status could cost him his job. Neither account supports a finding that he knew or should have known that there was a real possibility of losing his job.

¹⁰ See GD3-51 (GE-23-154).

[34] I find that the Appellant did not lose his job on April 1, 2022, because of misconduct.

Did the Appellant have good cause for not applying for benefits earlier?

[35] The Appellant applied for EI benefits on July 13, 2022. He wants his application to be treated as though it was made earlier, on December 12, 2021. This is called antedating (backdating) the application.

[36] To get his application antedated, the Appellant must prove two things:

- a) He had good cause for the delay during the entire period of the delay.
- b) He qualified for benefits on the day he wants his application antedated to—
December 12, 2021.¹¹

[37] The Appellant has to prove this on a balance of probabilities. This means that he must show that it is more likely than not that he had good cause for the delay and qualified for benefits.

[38] To show good cause, the Appellant has to prove that he acted as a reasonable and prudent person would have acted in similar circumstances to understand their entitlement to benefits and obligations under the law.¹²

[39] The Appellant must also show that he had good cause for the entire period of the delay.¹³ That period is from the day he wants his application antedated to until the day he actually applied. So, the period of the delay is from December 12, 2021, to July 13, 2022.

¹¹ See section 10(4) of the Act.

¹² See *Attorney General of Canada v Albrecht*, A-172-85.

¹³ See *Canada (Attorney General) v Burke*, 2012 FCA 139.

– **Did the Appellant have good cause for the delay?**

[40] I find that the Appellant did not have good cause for the delay in applying for benefits.

[41] The Appellant was aware of EI. At the hearing, he said he initially decided not to apply for EI after reading media reports and the Service Canada website. They made him doubt that his application would be successful. He only changed his mind after running into a colleague who was in a similar situation and had received EI.

[42] The Appellant said he was an avid consumer of media. He said that he knew “a lot about what [went] on” generally and that he was educated and good at research. As he did with the vaccine, he did his own research, formed his own opinions, and made his own assumptions. Notably, he repeatedly said that he did not apply initially because his research told him that his application “might not” be successful.

[43] The Appellant provided the Commission with some media reports and other documents that he said supported his decision.¹⁴ I have reviewed these carefully. At the most, they suggest that each case would be determined on its merits and that employees who were suspended or let go for not following their employers’ vaccination policies might not get EI.

[44] The Appellant’s initial decision not to apply because he might not be successful was simply not reasonable in the circumstances. A lack of success is a possibility that all EI claimants face. Each case is determined on its merits.

[45] The Appellant did not act as a reasonable and prudent person would. He did not contact or visit Service Canada to ask about his entitlement. His inaction was based on his assumptions and opinions and went on for several months. He held on to his views through his suspension and then when he lost his job. A reasonable and prudent person in his situation would have taken reasonable and simple steps to better understand how to protect their interests and meet their obligations.

¹⁴ See GD3-31 to GD3-38 (GE-23-155).

[46] The Appellant says that the pandemic was a difficult and confusing time. He should not be punished for his efforts in deciding what was best for him. He says that we all need to respect each other's beliefs and understand that not everyone has the same perceptions of what happened these last few years.¹⁵

[47] I agree that the pandemic was very difficult. It was stressful for most people trying to navigate workplace policies and public health mandates. There was a lot of information and misinformation being communicated by people and in the media. And it is true that people have different views about the pandemic and the response. But having a different view of these issues does not entitle a person to disregard their responsibility to take reasonable steps to learn about their rights and obligations.

[48] The Appellant has not shown that he had good cause for the delay in applying for benefits. Because of this, I do not need to consider whether he qualified for benefits on December 12, 2021.

¹⁵ See GD3-44 (GE-23-154).

Conclusion

[49] The appeal is allowed in part.

[50] The Commission has proven that the Appellant knew that he could be suspended on December 13, 2021, for not following his employer's COVID-19 vaccination policy. He was disentitled to benefits while he was suspended.

[51] However, the Commission has not proven that the Appellant knew or should have known he could lose his job on April 1, 2022. He is not disqualified as of April 1, 2022, for losing his job because of misconduct.

[52] Lastly, the Appellant has not proven that he had good cause for the delay in applying for benefits throughout the entire period of the delay. This means that his application cannot be antedated to December 12, 2021. His claim for EI benefits is effective July 10, 2022.

Benson Cowan
Member, General Division – Employment Insurance Section