



Citation: *TD v Canada Employment Insurance Commission*, 2022 SST 1782

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

Decision

Appellant (Claimant): T. D.

Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (490418) dated June 20, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: Teleconference

Hearing date: October 24, 2022

Hearing participant: Appellant

Decision date: November 2, 2022

File number: GE-22-2263

Decision

[1] The appeal is dismissed.

[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 him to be suspended from his job). This means the Claimant is disqualified from receiving Employment Insurance (EI) benefits from November 30, 2021, to June 20, 2022.¹

Overview

[3] The Claimant worked as a court officer and was placed on an unpaid leave of absence on November 30, 2021. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence because he didn't comply with their Covid-19 vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from November 30, 2021, to June 20, 2022. The Commission further explained that since the Claimant returned to his job on June 21, 2022, his suspension ended on June 20, 2022.

[5] The Commission says the Claimant's non-compliance with the employer's Covid-19 vaccination policy was misconduct.

[6] The Claimant says the employer breached his collective bargaining agreement.

¹ Section 31 of the *Employment Insurance Act* (EI Act) says that 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 of the EI Act to qualify to receive benefits

Issue

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

Analysis

[8] 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 was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why was the Claimant suspended from his job?

[9] I find the Claimant was suspended from his job because he didn't comply with the employer's Covid-19 vaccination policy.

[10] The Commission says the reason the employer gave is the reason for the suspension. The employer told the Commission that the Claimant was placed on an unpaid leave of absence because he didn't comply with their Covid-19 vaccination policy.

[11] The Claimant doesn't dispute that he was placed on an unpaid leave of absence for not complying with employer's Covid-19 vaccination policy. However, the Claimant says there was no misconduct on his part and the employer breached the collective agreement.

[12] I find the Claimant was suspended from his job for failing to comply with the employer's Covid-19 vaccination policy.

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

[13] The reason for the Claimant's suspension is misconduct under the law.

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ The Claimant 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.⁴

[15] 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 suspended or let go because of that.⁵

[16] 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.⁶

[17] The Commission says there was misconduct because the Claimant made a deliberate decision to not comply with the employer's Covid-19 vaccination policy.

[18] The Claimant says there was no misconduct because the employer breached the collective agreement and violated his constitutional rights.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was aware of the employer's Covid-19 vaccination policy and that he would be placed on an indefinite unpaid leave of absence for not complying with the policy (GD3-29). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees must be fully vaccinated by November 30, 2021, or they wouldn't be able to perform their assigned duties (GD3-34). I realize the Claimant argued that the employer's vaccination policy was illegal and breached his collective agreement. However, the matter of determining whether the employer's

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

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

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.⁷

Additional Testimony from Claimant

[20] I realize the Claimant testified that he returned to his job on June 21, 2022, without any reprimand or disciplinary action. Nevertheless, the only issue before me was whether the Claimant was suspended from his job from November 30, 2021, to June 20, 2022, because of misconduct. On this matter, I must apply the law. In other words, I cannot ignore the law even for compassionate reasons.⁸

[21] Finally, the Claimant argued that the employer directly violated his constitutional rights. As mentioned, the matter of determining whether the employer's Covid-19 vaccination policy was fair or reasonable wasn't within my jurisdiction. Other avenues existed for the Claimant to make these arguments.⁹

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

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

⁷ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

⁸ *Knee v Canada (Attorney General)*, 2011 FCA 301

⁹ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

Conclusion

[23] The Commission has proven the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits from November 30, 2021, to June 20, 2022.

[24] This means the appeal is dismissed

Gerry McCarthy

Member, General Division – Employment Insurance Section