



Citation: *EF v Canada Employment Insurance Commission*, 2023 SST 842

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

Decision

Appellant: E. F.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (479707) dated August 12, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: Videoconference

Hearing date: February 15, 2023

Hearing participant: Appellant

Decision date: March 10, 2023

File number: GE-22-2948

Decision

[1] E. F. is the Appellant. The Canada Employment Insurance Commission (Commission) says he can't get Employment Insurance (EI) benefits. This is because 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 his employer suspended him because of misconduct, under the meaning of the law. This means he can't get EI benefits during his suspension.

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 religious or medical reasons. The Appellant asked his employer for an exemption from the policy, but the employer refused his request. The Appellant didn't give his employer proof of vaccination by the deadline, and so his employer put him on an unpaid leave of absence.

[4] The Commission says this means that the Appellant's employer suspended him for misconduct. The Commission says this is because he knew about his employer's COVID-19 vaccination policy. He knew his employer would suspend him if he didn't follow the policy. And the Commission says he acted deliberately when he didn't follow the employer's policy.

[5] The Appellant disagrees. He says that his employer should have granted his religious exemption request. He says his employer could have accommodated him by letting him work from home. He also says that he has the right to make his own decisions about medical procedures without any coercion.

Matter I have to consider first

I will accept the documents sent in after the hearing

[6] After the hearing, the Commission sent extra documents. The Commission was responding to a submission the Appellant made on the day of the hearing. The Appellant had sent a copy of a General Division decision that he said was relevant to his appeal.

[7] I decided to accept the Commission's document. This is because I didn't think it would be unfair to the Appellant if I accepted the document.

Issue

[8] Did the Appellant stop working because of misconduct?

Analysis

[9] To answer the question of whether the Appellant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Appellant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant stop working?

[10] I find that the Appellant stopped working because his employer suspended him. I find the employer suspended him because he didn't show proof of vaccination against COVID-19 by the employer's deadline.

[11] 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 the COVID-19 vaccination policy.

[12] The Appellant says his employer put him on an unpaid leave of absence. He agrees that he stopped working because of the employer's COVID-19 vaccination policy.

[13] I will treat the Appellant's loss of employment as a suspension. This is because the Appellant has always said that he didn't choose to leave his job. He has always said his employer chose to temporarily suspend his employment. He eventually returned to work in March 2022.

[14] So, I find that the best way to look at the Appellant's loss of employment is to treat it as a suspension.

[15] Both the Appellant and the Commission agree that the employer suspended the Appellant because of its COVID-19 vaccination policy. The employer expected the Appellant to show proof of vaccination against COVID-19 by its deadline. The Appellant didn't give his employer proof of vaccination and his employer didn't approve his request for an exemption from the policy. This is the only reason for the Appellant's suspension.

[16] So, now I must decide if the Appellant's actions are misconduct under the meaning of the law.

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

[17] I find that the reason for the Appellant's suspension is misconduct under the meaning of the law.

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

¹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

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

[19] 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 a suspension because of that.⁴

[20] The Commission has to prove that the Appellant stopped working 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 stopped working because of misconduct.⁵

[21] The Commission says the Appellant's employer suspended him because of misconduct. The Commission says he knew about his employer's COVID-19 vaccination policy. He knew his employer would suspend him if he didn't follow the policy. He knew his employer hadn't approved his exemption request. The Commission says he acted deliberately when he decided not to follow the employer's policy.

[22] The Appellant disagrees. He says that his employer should have granted his religious exemption request. He says his employer could have accommodated him. He says that his employer doesn't think he stopped working because of misconduct. And he says that it is his right to make his own decisions about medical treatment.

[23] I agree with the Commission. I find that the reason for the Appellant's suspension is misconduct under the meaning of the law.

[24] The Appellant and the Commission agree about many of the basic facts in this appeal. Since they agree on these facts, I can accept the following information about the employer's policy and the Appellant's actions.

[25] The Appellant agrees that he knew about his employer's COVID-19 vaccination policy. He agrees that the employer notified him of the policy by emailing it to him. Under the employer's policy, the Appellant agrees that his employer expected him to show proof of vaccination against COVID-19. The policy allowed employees to ask for

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

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

an exemption for certain reasons. So, the Appellant asked his employer for an exemption from the policy on religious grounds.

[26] The Appellant's employer refused the Appellant's request for an exemption. The Appellant agrees that he knew his employer had refused his request before the deadline. The Appellant didn't show his employer proof of vaccination by the deadline.

[27] The policy says that the employer will put unvaccinated employees on an unpaid leave of absence starting November 30, 2021. The Appellant agrees that this was written in the policy. But at the hearing, he said he wasn't sure what would happen to his job after the deadline. This is because he said his employer didn't give him any chance to discuss the policy.

[28] Even if the Appellant says he wasn't sure if his employer would suspend him after the deadline, I think he reasonably should have known it was likely he the employer would suspend him. This is because the employer's policy clearly says that it will suspend unvaccinated employees.

[29] I understand that the Appellant argues that his employer should have granted his exemption request. He says his employer should have accommodated him. He argues that his employer doesn't consider his actions to be misconduct. He says his employer's policy is unfair.

[30] I am not persuaded by any of these arguments. The decision about whether the Appellant stopped working because of misconduct isn't up to the employer. This is because I have to look at the facts and the law and make my own decision about whether there was misconduct. Case law says I can't accept the employer's opinion about whether there was misconduct or not.⁶

[31] I also understand that the Appellant thinks I should follow the reasoning of another Tribunal Member in the decision he submitted after the hearing.⁷

⁶ *Crichlow v Canada (Attorney General)*, A-562-97, at paragraph 4.

⁷ *AL v Canada Employment Insurance Commission*, 2022 SST 1428.

[32] I am not persuaded by this decision. I won't follow it as I make my decision.

[33] The Tribunal tries to make decisions that are consistent. This means that Tribunal Members should try to follow each others' decisions. But some decisions are outliers. They might interpret the law in a different way. They might use the same case law to reach a novel conclusion. Decisions from the Tribunal aren't binding on other Tribunal Members. But Federal Court and Federal Court of Appeal decisions form part of the law and I have to follow them.

[34] And Federal Court of Appeal and Federal Court decisions consistently say that I can't look at the employer's actions when I am making a decision about misconduct. I can't look at whether the employer should have accommodated the Appellant or given him an exemption from the policy. I can't make a decision about whether the employer's policy was fair or justified. I can only look at the Appellant's own actions and decide if the reason for his suspension meets the test for misconduct.⁸

[35] And even though other Tribunal decisions aren't part of the law, I must note that there are many General Division and Appeal Division decisions that have looked at similar circumstances. These decisions say that refusing to get vaccinated against COVID-19 can be misconduct. In particular, many Appeal Division decisions agree that there is misconduct when the following conditions are in place:⁹

- The employer has a clear policy about COVID-19 vaccination
- The employer notifies the employees of the policy and gives them enough time to follow the policy
- The policy is clear about the consequences of refusing to follow the policy

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34. Also see *Cecchetto v Canada (Attorney General)*, 2023 FC 102.

⁹ See, for instance, two recent AD decisions: *SS v Canada Employment Insurance Commission*, 2022 SST 1004 and *MF v Canada Employment Insurance Commission*, 2022 SST 1099.

- As a result, the employee knows, or reasonably ought to know that they will probably lose their job or face suspension if they don't follow the employer's policy
- Even so, the employee makes a deliberate choice not to follow the employer's COVID-19 vaccination policy

[36] I find that all of these conditions are in place in this appeal.

[37] The Appellant knew about his employer's COVID-19 vaccination policy. He received notice of the policy before the deadline. He knew the policy said the employer would suspend him if he didn't show proof of vaccination. He knew the employer had refused his request for an exemption from the policy. Even so, he made a deliberate choice when he decided not to follow the employer's COVID-19 vaccination policy.

[38] So, I find that the Appellant's employer suspended him because of misconduct. My decision is consistent with Federal Court and Federal Court of Appeal case law. My decision is also consistent with many other Tribunal decisions.

Conclusion

[39] I am dismissing the Appellant's appeal. I find that his employer suspended him because of misconduct. This means he can't get EI benefits during his suspension.

Amanda Pezzutto
Member, General Division – Employment Insurance Section