Citation: *JW v Canada Employment Insurance Commission*, 2023 SST 890

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	J. W.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (534066) dated October 5, 2022 (issued by Service Canada)

Tribunal member:	Marc St-Jules
Type of hearing:	Teleconference
Hearing date:	April 11, 2023
Hearing participant:	Appellant
Decision date:	May 16, 2023
File number:	GE-22-3565

Decision

[1] I am dismissing the appeal with modification. The Tribunal disagrees with the Appellant.[1] The modification relates to the reasons the Appellant is not entitled to benefits. The modification is described in the following paragraphs.

[2] Starting November 22, 2021, the Appellant is **disentitled** from receiving benefits. This is until February 9, 2021. This is the overlap between leave of absence and the start of the claim. The Appellant was suspended because of misconduct.[2]

[3] Starting February 6, 2022, the Appellant is then **disqualified** as he was dismissed from his job because of misconduct.[3] The Appellant was terminated on February 10, 2022. Disqualifications start on the Sunday of the week in which the event occurred.[4]

[4] In this appeal the Canada Employment Insurance Commission (Commission) has proven that the Appellant's employer suspended and terminated him because of misconduct. In other words, because he did something that caused him to be suspended and terminated from his job.

[5] This means that the Appellant isn't entitled to receive Employment Insurance (EI) following his suspension and termination.

Overview

[6] The employer put the Appellant on an involuntary unpaid leave of absence starting November 15, 2021. The Appellant was then dismissed February 10, 2022. The reason in each case was because the Appellant had not complied with the

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[1] In my decision, I use "Appellant," rather than the "Claimant." I am doing this because the Appellant is the person who requested the appeal. The Commission uses "Claimant" because the Employment Insurance Act (EI Act) uses the word "claimant," meaning a person who has made a claim for EI benefits.
[2] Section 31 of the EI Act says that claimants who are **suspended** from their job because of misconduct are **disentitled** from receiving benefits for a period of time.
[3] Section 30 of the EI Act says a claimant is **disqualified** from receiving EI benefits if they lose their employment due to their own misconduct. It has been determined that the reason the Appellant was terminated from his employment on February 10, 2022, was due to his own misconduct, he has been disqualified from EI benefits as of that date.
[4] The event in this case is the termination.

mandatory vaccination policy. The Commission is saying the employer put him on leave of absence because he didn't follow its mandatory COVID vaccination policy (vaccination policy).

[7] The Commission decided that the Appellant was suspended from his job for a reason the *Employment Insurance Act* (EI Act) considers to be misconduct. Because of this, the Commission was unable to pay him EI benefits from November 22, 2022.

[8] The Appellant disagrees. His suspension and termination were not justified. The employer`s actions were illegal.

[9] I have to decide whether the Appellant was suspended and terminated from his job for misconduct under the EI Act.

Matters I have to consider first

The hearing was adjourned

[10] The Appellant was asked to attend a hearing originally scheduled for March 7, 2023. On March 6, 2023, the Appellant made a request to reschedule as he was attending training and could not attend as requested.

[11] In response to this, a case conference was scheduled on March 27, 2023. The adjournment was granted at this time. A new teleconference hearing was scheduled for April 11, 2023. The new hearing took place as scheduled with the Appellant in attendance.

Issue

[12] Was the Appellant`s suspension then dismissal misconduct under the EI Act?

Analysis

[13] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you.

[14] I have to decide two things. I have to decide why the Appellant was suspended and terminated from his job. I then need to decide if this is considered misconduct under the EI Act.

[15] An employee who loses their job due to "misconduct" is not entitled to receive EI benefits; the term "misconduct" in this context refers to the employee's violation of an employment rule.

The reason the Appellant was suspended and terminated

[16] I find the Appellant's employer suspended him because he didn't comply with its vaccination policy.

[17] The Appellant and the Commission agree that the Appellant was suspended effective November 15, 2021.[5] The reason was non-compliance with the new mandatory vaccine policy. The parties do not agree on the misconduct part. The Appellant says that the policy was wrong. He has a right to decline vaccination. The policy violates other laws that should apply.

[18] I have no reason to believe any other reason why the Appellant was suspended from his job. There is nothing in the file or in testimony to make me doubt this finding.

[19] Based on the evidence before me, I find non-compliance with the vaccination policy is the reason the Appellant was placed on unpaid leave then terminated.

The reason is misconduct under the law

[20] The Appellant's failure to comply with his employer's vaccination policy is misconduct under the EI Act.

What misconduct means under the EI Act

[5] In the first letter to the Appellant, the Commission decided that the Appellant had voluntarily left his job without just cause. The Appellant disagreed with this decision when requesting his reconsideration. He says that it was an involuntary leave, and he was forced to take the leave. The Commission now agrees the Appellant was forced to take the leave. They now agree it is a suspension.

[21] The EI Act doesn't say what misconduct means. Court decisions set out the legal test for misconduct. The legal test tells me the types of facts and the issues I have to consider when making my decision.

[22] The Commission has to prove it's more likely than not he was suspended from his job because of misconduct, and not for another reason.[6]

[23] I have to focus on what the Appellant did or failed to do, and whether that conduct amounts to misconduct under the EI Act.[7] I can't consider whether the employer's policy is reasonable, or whether a suspension or termination was a reasonable penalty.[8]

[24] The Appellant doesn't have to have wrongful intent. In other words, he doesn't have to mean to do something wrong for me to decide his conduct is misconduct.[9] To be misconduct, his conduct has to be wilful, meaning conscious, deliberate, or intentional.[10] And misconduct also includes conduct that is so reckless that it is almost wilful.[11]

[25] There is misconduct if the Appellant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and knew or should have known there was a real possibility of being let go because of that.[12]

[26] I can only decide whether there was misconduct under the EI Act. I can't make my decision based on other laws.[13] I can't decide whether the Appellant was constructively or wrongfully dismissed under employment law. The same goes for a

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[6] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[7] This is what sections 30 and 31 of the EI Act say.
[8] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.
[9] See *Attorney General of Canada v Secours*, A-352-94.
[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *McKay-Eden v His Majesty the Queen*, A-402-96.
[12] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[13] See *Canada (Attorney General) v McNamara*, 2007 FCA 107. The Tribunal can decide cases based on the *Canadian Charter of Rights and Freedoms*, in limited circumstances—where an appellant is challenging the EI Act or regulations made under it, the *Department of Employment and Social Development Act* or regulations made under it, and certain actions taken by government decision-makers under those laws. In this appeal, the Appellant isn't.

suspension without pay. I can't interpret an employment contract or decide whether an employer breached a collective agreement.[14] I also can't decide whether an employer discriminated against the Appellant or should have accommodated them under human rights law.[15] And I can't decide whether an employer breached the Appellant's privacy or other rights in the employment context, or otherwise.

What the Commission and the Appellant say

[27] 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.
- Under the vaccination policy, all employees needed to comply by taking the required vaccines or obtain an exemption request.
- The Appellant knew what he had to do under the policy.
- He also knew his employer could suspend him or terminate him under the policy.
- He made a conscious and deliberate personal choice not to comply with the policy.

[28] The Appellant says there was no misconduct under the EI Act because of the following:

- The vaccine policy was unilaterally imposed and not part of his conditions of employment.[16]
- The vaccine policy was based on government collusion with companies to force employees to take gene therapy.
- Vaccines are not mandatory in Canada.
- Privacy rights are being violated.
- Human rights are being violated.

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[14] See *Canada (Attorney General) v McNamara*, 2007 FCA 107 at paragraph 22.
[15] See *Paradis v Canada (Attorney General)*, 2016 FC 1282; and *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[16] See GD2 page 5

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

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

[31] In this case, there is no dispute in the evidence. As a Tribunal member, I must rule on the balance of probabilities. The evidence is clear in this case. The problem is that that Appellant wants other laws to have been considered but the Tribunal has no jurisdiction on those laws.

[32] The Appellant agrees that the policy was communicated to him in August or September 2021. He agrees he read it and that non-compliance may lead up to termination. He was not sure what exactly the employer would do but agrees it stated it could lead to termination.

[33] The test that needs to be met is the EI Act. This legal test is what the Tribunal needs to review. The Commission has proven that the Appellant was advised of the policy, knew the consequences of non-compliance and followed through with his non-compliance knowing it could lead to his suspension. His behaviour was wilful. His actions were conscious, deliberate or intentional.

[34] I find the Appellant had no wrongful intent. Nothing in the evidence suggests this. As mentioned above, for there to be misconduct, the test that needs to be met was wilfulness. There is no need to prove wrongful intent.

[35] I can only decide whether his conduct is misconduct under the EI Act. I can't make my decision based on other laws.[17] So, I can't consider whether his employer's

[17] See for example the Federal Court of Appeal's decision in *Canada (Attorney General) v McNamara*, 2007 FCA 107.

policy or the penalty it applied to him is reasonable or legal under other laws. This includes considering if the COVID vaccination policy is in violation of other laws.

[36] There have also been more recent court cases which support mandatory vaccination policies. In a recent case called *Parmar*,[18] 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.

[37] 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 …

[38] Jurisprudence has confirmed the Tribunal's limited jurisdiction as mentioned above. Another recent case from January 2023, the Federal Court agrees that the Tribunal has limited authority.[19] The case started with the Commission then went to the Tribunal's General Division. The Appeal division then upheld the decision. The Federal Court then reviewed the decision. 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 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

[18] See *Parmar v Tribe Management Inc.*, 2022 BCSC 1675.
[19] See *Cecchetto v. Canada* (Attorney General) 2023 FC 102.

> 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.

[39] I therefore make no findings with respect to the validity of the policy or any violations of the Appellant's rights under other laws.

[40] I agree the Appellant can decline vaccination. That is his own personal decision. 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. The employer has a responsibility to provide a safe workplace.

[41] 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, and he knew about his duty to disclose his vaccination status by the deadline. He also knew the consequences if he failed to comply with the policy.
- He knew that his employer would suspend and terminate him if he didn't comply with the policy.
- He consciously, deliberately, or intentionally made a personal decision not to comply by the deadline.

[42] 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.[20]

[43] The Commission made a request that the Appellant would be entitled to benefits as of February 12, 2022.[21] They argues that under section 31(b), the disentitlement should end when a person quits or is dismissed while on leave without pay. I agree this part. However, the Commission made an error and did not consider a disqualification

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[20] See *Canada (Attorney General) v Knee*, 2011 FCA 301, at paragraph 9.
[21] See GD4 page 5.

under section 30 of the EI Act. Starting February 6, 2022, the Appellant is disqualified under section 30 for having been terminated under a reason the EI Act considers to be misconduct.

[44] For this reason, the Appellant is not entitled starting February 12, 2022, as suggested by the Commission.

Conclusion

[45] The Commission has proven that the Appellant was suspended and terminated from his job for misconduct under the EI Act.

[46] The Appellant is therefore suspended for misconduct. This means he is disentitled from benefits from November 22, 2022, when the claim starts up to and including February 9, 2022.

[47] The Appellant was terminated February 10, 2022. The Appellant is disqualified from benefits starting February 6, 2022. This is the Sunday of the week in which he was terminated. As explained above, disqualifications start on the Sunday of the week in which the event occurred.

[48] So, I am dismissing his appeal with modification.

Marc St-Jules
Member, General Division – Employment Insurance Section