



Citation: *FA v Canada Employment Insurance Commission*, 2023 SST 1116

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

Decision

Appellant: F. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision dated May 16, 2022 (issued by Service Canada)

Tribunal member: Marisa Victor

Type of hearing: Teleconference

Hearing date: July 13, 2023

Hearing participant: Appellant

Decision date: July 27, 2023

File number: GE-23-1321

Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Appellant 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 that the Appellant isn't disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant was placed on an unpaid leave of absence by his employer. The Appellant's employer says that he was placed on an unpaid leave of absence because he went against its vaccination policy: he didn't attest to being vaccinated.

[4] The Appellant doesn't dispute that this happened but says he did not commit misconduct.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Appellant's leave of absence was a suspension and that the suspension was because of misconduct. Because of this, the Commission decided that the Appellant is disentitled from receiving EI benefits.

[6] The Appellant first appealed the denial of EI benefits to the Tribunal's General Division in June 2022. The General Division member summarily dismissed the Appellant's appeal without a hearing.²

[7] The Appellant appealed the General Division's decision to the Tribunal's Appeal Division. The Appeal Division member found the Claimant's appeal should not have been summarily dismissed. The Appeal Division member ordered the appeal to be returned to the General Division for a hearing before a different member.³

¹ Section 30 of the *Employment Insurance Act* (EI Act) says that Appellants who lose their job because of misconduct are disqualified from receiving benefits.

² See *FK v Canada Employment Insurance Commission*, GE-22- 2127

³ See *FK v Canada Employment Insurance Commission*, AD-23-178

[8] This decision is as a result of that hearing.

Issue

[9] Did the Appellant get suspended from his job because of misconduct?

Analysis

[10] 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.⁴

[11] To answer the question of whether the Appellant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Appellant was suspended from his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant get suspended from his job?

[12] I find that the Appellant was suspended from his job because his employer said he went against its vaccination policy.

[13] The Commission says that the Appellant's employer instituted a Covid-19 vaccination policy. The Commission says that when the Appellant did not comply with the policy, his employer placed him on an unpaid leave of absence. The Commission decided this unpaid leave of absence was a suspension within the meaning of the EI Act. This is because the separation from employment was initiated by the employer the Appellant had failed to comply with its policy.

[14] The Appellant says that he was placed on an unpaid leave of absence by his employer because his employer says he did not comply with the Covid-19 vaccination policy. However, he says it was a forced leave by his employer in violation of his employment contract. He also says that his employer did not classify his leave of absence as a suspension on his Record of Employment (ROE).

⁴ See sections 30 and 31 of the Act.

[15] I find that both parties agree that the Appellant's leave of absence from work was because the employer said that the Appellant did not comply with its covid-19 vaccination policy.

[16] I also find that the Commission's categorization of the Appellant's forced leave of absence as a suspension is appropriate within the EI Act.⁵ Both parties agree that the leave of absence was a separation of employment initiated by the employer due to the employer's position that the Appellant had failed to comply with a workplace policy. This is supported by the employer's letter to the Appellant on February 14, 2022 explaining the reasons for the separation from employment. I find that this describes a suspension, even if that is not how the employer categorized the separation of employment in the ROE.

[17] Therefore, I find that the Appellant's suspension was due to his employer's position that the Appellant had not complied with the covid-19 vaccination policy.

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

[18] The Commission has not proven that the Appellant's dismissal is misconduct under the law.

[19] The Commission has to prove that the Appellant 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 Appellant was suspended from his job because of misconduct.⁶

[20] The EI Act doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's suspension is misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

⁵ See section 31 of the EI Act.

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

[21] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁷ Misconduct also includes conduct that is so reckless that it is almost wilful.⁸ 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.⁹

[22] 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 suspended because of that.¹⁰

[23] I only have the power to decide questions under the Act. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the employer acted improperly or should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.¹¹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[24] The Commission says that there was misconduct because:

- The employer instituted a mandatory Covid-19 vaccination policy that required all employees to be fully vaccinated
- The Appellant acknowledged that he was advised of the policy and the consequences of non-compliance that included being placed on an unpaid leave of absence
- The employer placed the Appellant on an unpaid leave of absence when he failed to comply with the employer's policy

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁹ See *Attorney General of Canada v Secours*, A-352-94.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

- The employer provided a letter to the Appellant explaining to him that he was being placed on an unpaid leave of absence because he did not attest to being vaccinated by the deadline of February 14, 2022.

[25] The Appellant says that there was no misconduct because:

- Forced medical treatment goes against his belief as a Muslim
- The Appellant provided valid reasons why he did not want to be vaccinated
- The Appellant's decision not to be vaccinated is not misconduct because the Appellant has a right to control what happens to his body and he has a legal right to refuse medical treatment
- There was no express duty or implied duty in his employment contract that required him to be vaccinated
- The Appellant never agreed to be vaccinated when he accepted his position with the employer
- The Appellant's collective agreement was never amended to required vaccination
- There was no legislation that required mandatory vaccination.

[26] Neither party filed as evidence the employer's vaccination policy. The Appellant, however, did testify to his understanding of the policy. He said that at first the policy required vaccination by October 21, 2021. At that time, those who did not attest to being vaccinated were able to work if they masked and completed rapid testing two times a week. The Appellant followed this process. Then, in December 2021, the employer changed the policy to discontinue rapid testing. The Appellant was then given until February 1, 2022 to attest to being fully vaccinated.

[27] The Appellant then applied for a religious exemption in January 2022. He reached out to his religious leaders for supporting documents. He applied for the

religious exemption through the process set out in the vaccination policy. He was told his religious exemption request would be taken under consideration.

[28] The Appellant said that he then got sick and as a result was off work. As a result, his deadline for attesting that he had been vaccinated was changed to February 14, 2022.

[29] The Appellant said he returned to work from sick leave on February 14, 2022. He had still not heard back from his employer with regard to his request for a religious exemption. On that same day, he was called into the office to speak with his manager. In that meeting he was told he was being placed on an unpaid leave of absence for failing to comply with the employer's Covid-19 vaccination policy and provided with the Feb 14, 2022 letter from the employer explaining the reasons for the employer's decision. The letter does not mention the pending religious accommodation request. The employer verbally acknowledged during the meeting that his religious exemption request was still being processed.

[30] The Appellant said that the employer's vaccination policy contained a right to obtain a religious exemption. The Appellant testified that the employer had put that process in place through an online portal. The Appellant said that he applied through the portal in compliance with the Covid-19 vaccination policy.

[31] The Appellant's request for a religious exemption was denied on February 17, 2022, after he had already been placed on an unpaid leave of absence.

[32] I find that the Commission has not proven that the Appellant had committed misconduct on the date that the Appellant was suspended. This is because at the time of suspension, the evidence doesn't support that the Appellant knew or reasonably should have known that he could be suspended because of his conduct.

[33] There is no dispute that the Appellant was aware of the employer's vaccination policy. The Appellant submitted a request for a religious exemption in accordance with that policy. This supports the finding that the Appellant intended to comply with the policy by getting an approved exemption.

[34] I find that the Appellant followed the employer's policy to obtain a religious exemption. I did not have the vaccination policy as evidence before me, however, I accept the Appellant's testimony that there was a process for applying for a religious exemption. There is no evidence to contradict this. The Appellant also provided as evidence his application for a religious exemption together with his supporting documents from his religious leaders. Finally, I have the letter from the employer denying the exemption request on February 17, 2022.

[35] I find that the Appellant only found out he was not in compliance with the policy after his religious exemption was denied on February 17, 2022. At the time that he was suspended, the Appellant's religious exemption had not yet been processed. As a result, there is no indication that the Appellant had deliberately violated the employer's policy before he was suspended on February 14, 2022.

[36] For the Appellant's conduct to be misconduct within the meaning of the EI Act, he must have wilfully committed the conduct. The conduct in question is that the Appellant did not comply with the employer's COVID-19 vaccination policy. Here, the Appellant did not wilfully act in non-compliance with the policy before he was suspended from his job on February 14, 2022.

[37] Before his religious exemption request was denied, the Appellant could not have known, nor could he have reasonably known, that he could be suspended for his conduct because he was still acting in accordance with the policy. So, I find the Appellant was not wilfully non-compliant with the employer's policy at the time he was suspended from work.

[38] I have found that the Commission has not proven that the Appellant, at the time of his suspension, had wilfully gone against his employer's vaccination policy. Therefore, I do not need to consider the Appellant's other arguments.

[39] I understand, though, that the Appellant's main argument was that his employer breached his employment contract because there was a lack of an explicit and/or implicit term in his collective agreement that required the Appellant to be vaccinated.

[40] I have to focus on whether what the Appellant did, or failed to do, was misconduct under the EI Act. The Court has made it clear that the focus must be on what an appellant has or has not done.¹² I cannot make any decisions about whether the Appellant has other options under other laws, though I note, he is already pursuing a union grievance.

[41] There are other avenues open to an appellant if they do not feel that the employer was acting within an agreement. For that reason, I am not going to decide whether the employer breached a term in the collective agreement as that is outside of my authority.

So, did the Appellant get suspended from his job because of misconduct?

[42] Based on my findings above, I find that the Appellant didn't get suspended from his job because of misconduct.

Conclusion

[43] The Commission hasn't proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant isn't disentitled from receiving EI benefits.

[44] This means that the appeal is allowed.

Marisa Victor
Member, General Division – Employment Insurance Section

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107, *Paradis v. Canada (Attorney General)*, 2016 FC 1282, *Mishibinijima v. Canada (Attorney General)*, 2007 FCA 36.