Citation: *NS v Canada Employment Insurance Commission*, 2023 SST 1435

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	N. S.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision May 26, 2022 (issued by Service Canada)

Tribunal member:	Gerry McCarthy
Type of hearing:	Teleconference
Hearing date:	October 26, 2023
Hearing participants:	Appellant Witness
Decision date:	October 30, 2023
File number:	GE-23-2155

Decision

[1] The appeal is allowed.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven the Appellant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended). This means the Appellant isn't disentitled from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Appellant was placed on an unpaid leave of absence (suspension) by the employer on November 17, 2021. The Appellant was then dismissed by the employer on December 20, 2021. The Appellant's employer said he was suspended and then let go because he didn't provide the "Rapid Test result" as required by their vaccination policy.

[4] The Commission accepted the employer's reason for the dismissal. The Commission decided the Appellant lost his job because of misconduct. Because of this, the Commission initially decided the Appellant was disqualified from receiving EI benefits. The Appellant appealed the Commission's decision to the General Division of the Social Security Tribunal (Tribunal).

[5] On October 7, 2022, the General Division determined that the Appellant lost his job because of misconduct and was disqualified from EI benefits. The Appellant appealed the General Division decision to the Appeal Division of the Tribunal.

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[1] Section 31 of the *Employment Insurance Act* (EI Act) says that Appellants who are suspended from their job because of misconduct are not entitled to receive benefits until (a) the period of suspension expires; (b) the claimant loses or voluntarily leaves their employment; or (c) the claimant, after the beginning of the period of suspension, accumulates with another employer the number of hours of insurable employment required under the EI Act.

[6] On October 24, 2022, the Appellant was reinstated to his previous job with the employer with his seniority unchanged. The Appellant wasn't provided any settlement monies or compensation from the employer.

[7] On June 6, 2023, the Appeal Division returned the matter to the General Division so that it might fully consider the effect of the Appellant's reinstatement and to determine whether any potential (ongoing) suspension was due to misconduct. The Appeal Division further wrote that the Appellant's reinstatement effectively meant that the separation was no longer treated as if the Appellant had been dismissed. The Appeal Division explained that the Appellant wouldn't be disqualified from receiving EI benefits. However, the Appeal Division further explained this didn't necessarily mean the Appellant was entitled to receive benefits. The Appellant Division wrote there still needed to be a determination as to what the Appellant's status likely would have been between November 18, 2021, and October 24, 2022, had he not been dismissed.

[8] Furthermore, the Appeal Division explained that since the General Division didn't address the issue of whether the Appellant's suspension was due to misconduct it was appropriate to return the matter to the General Division for this reason as well.

[9] The Commission submitted that the finding of misconduct should remain, but the indefinite disqualification under the law should be replaced with a disentitlement from the benefit period commencement date (January 30, 2022) until October 24, 2022.

[10] The Commission furthers says that since the reinstatement on October 24, 2022, didn't include retroactive financial compensation the evidence leads to a conclusion it was more probable than not the employer merely replaced a dismissal with a longer period of suspension.

[11] The Appellant says he was willing to have the rapid antigen test but couldn't afford the cost on a weekly basis. He says he was wrongfully terminated by the employer. He further says he should be paid EI benefits from January 30, 2022, until his reinstatement on October 24, 2022.

Matter I have to consider first

[12] The Appellant's spouse (J. S.) wished to provide oral testimony as a Witness during the hearing. The Appellant's spouse was subsequently sworn-in and provided testimony during the hearing.

Issue

[13] Was the Appellant suspended from his job because of misconduct?

Analysis

[14] 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 was the Appellant suspended from his job?

[15] I find the Appellant was placed on an unpaid leave of absence (suspended) from his job because the employer indicated he hadn't provided the "Rapid Test result" as required by their vaccination policy (GD7-3).

[16] The Commission says the reason the employer gave is the reason for the suspension. The employer told the Commission the Appellant refused to provide his rapid antigen test results to them.

[17] The Appellant disagrees. The Appellant says he was willing to perform the rapid antigen test but couldn't afford the cost. He also says he was wrongfully terminated on December 20, 2021.

[18] I find the Appellant was placed on an unpaid leave of absence (suspension) because the employer concluded he hadn't provided the "Rapid Test result" as required by their vaccination policy.

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

[19] The reason for the Appellant's suspension isn't misconduct under the law.

[20] 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 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.[4]

[21] 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.[5]

[22] 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]

[23] The Commission says there was misconduct, because the Appellant was aware that failing to comply with the employer's vaccination policy could lead to a loss of employment whether temporary or permanent.

[24] The Appellant says there was no misconduct because he was willing to comply with the employer's vaccination policy but couldn't afford the cost of the rapid antigen test. He also says he provided the employer with links to government sites where they could order free tests.

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[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.

[25] I find the Commission hasn't proven there was misconduct for the following reasons:

[26] First: The Commission hasn't shown the Appellant made a conscious choice not to comply with the employer's vaccination policy. In other words, the Commission hasn't shown the Appellant ever directly advised the employer that he wouldn't take the rapid antigen test. Instead, the Appellant testified he couldn't afford to pay for the cost of the test on a weekly basis but was willing to perform the test. I realize the Commission submitted the Appellant intentionally chose not to comply with the employer's vaccination policy. However, I'm not able to conclude the Appellant intentionally chose not to comply with the employer's vaccination policy because he told the employer he would take the rapid antigen test.

[27] Second: The Commission hasn't shown where the Appellant's conduct was so reckless that it was almost wilful. For example, the Appellant didn't recklessly disregard the employer's vaccination policy. On the contrary, the Appellant told the employer he would take the rapid antigen test but couldn't afford the cost of the test. I realize that it was the employer's prerogative not to provide rapid antigen tests to their employees. However, I'm not questioning the fairness or merits of the employer's decision not to supply rapid antigen tests to their employees. Instead, I'm finding the Commission hasn't shown the Appellant wilfully refused to comply with the employer's vaccination policy.

Additional Submissions from the Commission

[28] I realize the Commission further submitted that as the Appellant's reinstatement on October 24, 2022, didn't include retroactive financial compensation, the evidence leads to a conclusion it was more probable than not the employer merely replaced a dismissal with a longer period of suspension. However, this was speculation on the part of the Commission. The fact is the Appellant was first placed on an unpaid leave of absence (suspension) on November 17, 2021, and then dismissed on December 20, 2021. Furthermore, the Appellant was reinstated to his job on October 24, 2022. In short, it's impossible to say definitively whether or not the employer would have kept the

Appellant on an unpaid leave of absence (suspension) if they hadn't dismissed him on December 20, 2021.

[29] I further realize the Commission's most recent submission was that the indefinite disqualification under the law should be replaced with a disentitlement. As a result, the only issue in front of me is whether the Commission has proven the Appellant was suspended from his job because of misconduct. As mentioned, I cannot conclude the Commission has shown the Appellant acted in a wilful and intentional manner since he was willing to comply with the employer's vaccination policy and take the rapid antigen test.

[30] Finally, I recognize the employer and Appellant disagreed on who should pay for the rapid antigen tests. However, it doesn't then follow that the Appellant willfully refused the employer's vaccination policy since he had agreed to take the rapid antigen testing.

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

[31] Based on my findings above, I find the Appellant wasn't suspended from his job because of misconduct.

Conclusion

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

[33] This means the appeal is allowed.

Gerry McCarthy

Member, General Division – Employment Insurance Section