



Citation: *DN v Canada Employment Insurance Commission*, 2023 SST 1134

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

Decision

Appellant: D. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (461301) dated April 21, 2022
(issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: In writing

Decision date: May 31, 2023

File number: GE-23-369

Decision

[1] The appeal is dismissed. I disagree with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven the Appellant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means the Appellant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Appellant lost his job. The Appellant's employer said he was let go because he didn't follow their mandatory COVID-19 vaccination policy (by getting vaccinated).

[4] Even though the Appellant doesn't dispute this happened, he says he didn't commit misconduct because of what his Record of Employment (ROE) says and because his employer later rescinded their policy. He also says the Commission didn't interpret the law correctly in his case.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Appellant lost his job because of misconduct. Because of this, the Commission decided the Appellant is disqualified from receiving EI benefits.

Matter I have to consider first

The Appellant didn't submit additional information to the Tribunal

[6] The Appellant asked for an in-writing hearing. I sent him a letter allowing that request and asking him to submit any other information he wanted me to consider as part of his appeal by May 19, 2023.² He didn't submit anything else by that deadline.

[7] So, I have gone ahead and decided this appeal based on the information that was already on file when I sent the Appellant the letter.

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

² GD9-1 to GD9-3.

Issue

[8] Did the Appellant lose his job because of misconduct?

Analysis

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

Why did the Appellant lose his job?

[10] I find the Appellant lost his job because he didn't follow his employer's mandatory COVID-19 vaccination policy (by getting vaccinated).

[11] The Appellant and his employer agree on why he lost his job. The Appellant says he was let go because he didn't follow his employer's policy.³ His employer told the Commission the same thing.⁴

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

[12] The reason for the Appellant's dismissal is misconduct under the law.

[13] The *Employment Insurance Act* (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Appellant's dismissal 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.

[14] Case law says that, to be misconduct, the conduct has to be wilful. This means the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless it is almost wilful.⁶ The Appellant doesn't have to have

³ GD3-9, GD3-34, GD3-41.

⁴ GD3-38.

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

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.⁷

[15] 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 that there was a real possibility of being let go because of that.⁸

[16] The Commission has to prove the Appellant was dismissed from his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show that it is more likely than not that the Appellant was dismissed from his job because of misconduct.⁹

[17] 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 Appellant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.¹⁰ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[18] The Commission says there was misconduct because the Appellant knew his employer had a mandatory COVID-19 vaccination policy and knew he could be let go for not following it, but he chose not to follow it anyway.¹¹

[19] The Appellant says there was no misconduct because his employer changed his ROE and later rescinded their policy. He also says the Commission didn't interpret the law correctly in his case because it ignored a relevant part of the *Digest of Entitlement Principles*.¹²

⁷ See *Attorney General of Canada v Secours*, A-352-94.

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ GD4-3.

¹² GD2-7.

[20] The Appellant's employer told the Commission¹³:

- They dismissed the Appellant for not following their mandatory COVID-19 vaccination policy.
- They introduced the policy in September 2021 and instructed employees to complete some educational training related to it in October 2021.
- Employees could ask for an exemption from the policy, but the Appellant didn't do that.
- They discussed the policy with the Appellant in October 2021, but he told them he wasn't going to follow it.
- They gave him a letter saying what would happen if he didn't follow their policy (he would be let go by December 12, 2021).
- They then extended the deadline to get vaccinated and ultimately let him go on January 3, 2022.

[21] The Appellant's employer's mandatory COVID-19 vaccination policy says the following:

- It is effective as of September 7, 2021 and applies to all employees.¹⁴
- All employees must be fully vaccinated by October 30, 2021.¹⁵
- Employees who don't follow the policy may be subject to discipline, up to and including dismissal.¹⁶

[22] The Appellant's employer also sent the Commission the following evidence:

- An email to employees, dated October 6, 2021. It says employees will be suspended without pay starting the week of November 1, 2021 if they aren't fully vaccinated (two COVID-19 vaccination doses). It also says employees will be let

¹³ GD3-40.

¹⁴ GD3-27, GD3-30.

¹⁵ GD3-28.

¹⁶ GD3-30.

go on December 13, 2022 if they haven't provided proof they are fully vaccinated.¹⁷

[23] The Appellant told the Commission:

- He knew about his employer's mandatory COVID-19 vaccination policy.¹⁸
- He didn't get vaccinated as the policy required. He had personal reasons and health considerations (he's allergic to erythromycin) for not getting vaccinated. He also wasn't asked for his private medical information when he started work there and it should remain private.¹⁹
- He didn't ask for an exemption from the policy. He wasn't sure a doctor would agree with him anyway.²⁰
- He knew he could be let go if he didn't follow the policy.²¹
- His employer sent out something in October 2021 about the consequences of not following the policy.²²

[24] The Appellant also argues²³:

- His employer issued a new ROE on December 22, 2022. The reason for issue now says "involuntary leave of absence".
- The Commission didn't interpret the law correctly in his case. It overlooked a relevant section in the *Digest of Entitlement Principles*, specifically Section 6.6.2, Authorized Period of Leave – Section 32.
- The Commission has discriminated against him and won't let him access benefits that he's entitled to.

¹⁷ GD3-31 to GD3-32.

¹⁸ GD3-9 to GD3-10, GD3-34, GD3-41.

¹⁹ GD3-36, GD3-41.

²⁰ GD3-41.

²¹ GD3-9 to GD3-10, GD3-34, GD3-41.

²² GD3-41.

²³ GD2-7.

- His employer rescinded their mandatory COVID-19 vaccination policy on December 1, 2022 and employees who had been let go were eligible to be rehired.
- His employer committed misconduct, not him.

[25] I find the Commission has proven there was misconduct for the following reasons.

[26] I find the Appellant committed the actions that led to his dismissal as he knew his employer had a mandatory COVID-19 vaccination policy and what he had to do to follow it.

[27] I further find the Appellant's actions were intentional as he made a conscious decision not to follow his employer's policy.

[28] There is evidence that the Appellant knew about his employer's policy. He said he knew about it, as noted above.

[29] There is also evidence that the Appellant chose not to follow his employer's policy. He said he didn't get vaccinated as the policy required, as noted above.

[30] I acknowledge the Appellant feels he didn't commit misconduct, but his employer did.

[31] But I find this argument isn't relevant here. This is because the Act and the Court say I must focus on the Appellant's actions (and not the employer's conduct) leading up to his dismissal when analyzing misconduct, as discussed above.

[32] In other words, I can't consider whether the Appellant's employer acted unfairly towards him in some way that relates to their mandatory COVID-19 vaccination policy (such as asking him for his private medical information). This goes well beyond what I can look at here. If the Appellant wants to pursue this argument further, he needs to do that through another forum.

[33] I also acknowledge the Appellant feels his employer's decision to later rescind their mandatory COVID-19 vaccination policy²⁴ shows he didn't commit misconduct.

[34] But once again, I find this argument isn't relevant here either. This is because I must look at the Appellant's actions **leading up to** his dismissal when analyzing misconduct, as discussed above.

[35] In other words, the Appellant's employer's decision to rescind their policy months after he was let go has no bearing on what I can look at here. If the Appellant wants to pursue this argument further, he needs to do that through another forum too.

[36] I acknowledge the Appellant feels his new ROE shows he didn't commit misconduct because the reason for issuing it now says "involuntary leave of absence."²⁵

[37] But I disagree. I can consider the ROE only as it relates to whether the Appellant committed misconduct under the law. I note the reason for issue on the new ROE actually says "leave of absence"²⁶, not "involuntary leave of absence" as the Appellant says. I also note the Appellant didn't submit any other information or evidence related to why his employer revised his ROE.

[38] On the other hand, I find there is clear evidence the Appellant didn't follow his employer's policy and was let go for this reason. He and his employer both say this is what happened, as noted above.

[39] So, for these reasons, I don't give the Appellant's new ROE much weight here.

[40] I also acknowledge the Appellant feels the Commission made a mistake by not applying a relevant section of the *Digest of Entitlement Principles* (Digest), specifically 6.6.2, which he says supports his argument that he didn't commit misconduct.²⁷

²⁴ The Appellant submitted documents from his employer about their decision to rescind their policy. See GD2-19 to GD2-21.

²⁵ GD2-7.

²⁶ GD2-16.

²⁷ The Appellant quotes part of this section in his submissions to the Tribunal. See GD2-7.

[41] But I disagree for two reasons.

[42] First, the Digest isn't law, so I don't have to follow it. The Digest is the Commission's internal policy. In other words, it's the Commission's rule book for staff to use when they decide EI claims. The Digest can't tell me how to decide cases.

[43] Second, I have to follow the EI Act, based on the plain meaning of the Act and what the courts have said about the EI Act. My focus is only on applying the legal test for misconduct (based on the court decisions) here, which means looking at the Appellant's actions leading up to his dismissal, as discussed above.

[44] So, for these reasons, I don't give Digest 6.6.2 much weight here either.

[45] Lastly, I acknowledge the Appellant feels the Commission has discriminated against him and won't let him access benefits he is entitled to.

[46] But I find this argument isn't relevant here either. This is because my focus is only on applying the legal test for misconduct, as discussed above.

[47] In other words, I can't look at how the Commission treated the Appellant when it assessed his claim for benefits. If the Appellant wants to pursue this argument, he needs to do that through another avenue.

[48] I also find the Appellant knew or should have known that not following his employer's mandatory COVID-19 vaccination policy could lead to him being let go.

[49] There is clear evidence the Appellant knew he could be let go if he didn't follow his employer's policy. He said he knew this could happen, as noted above.

[50] There is also other evidence that shows the Appellant's employer told the Appellant he could be let go if he didn't follow their policy. They sent an email on October 6, 2021 saying this, as noted above.

[51] So, I find the evidence shows the Appellant's employer told him he would be let go if he didn't get vaccinated by their policy deadline. This means he knew or should have known he could be let go for that reason.

[52] I therefore find the Appellant's conduct is misconduct under the law since he committed the conduct that led to his dismissal (he didn't follow his employer's mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known his actions would lead to him being dismissed.

So, did the Appellant lose his job because of misconduct?

[53] Based on my findings above, I find the Appellant lost his job because of misconduct.

[54] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew or ought to have known that not getting vaccinated (as his employer's policy required) was likely to cause him to be let go from his job.

Conclusion

[55] The Commission has proven the Appellant lost his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[56] This means the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section