



Citation: *RL v Canada Employment Insurance Commission*, 2023 SST 1152

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: R. L.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (477862) dated August 11, 2022 (issued by Service Canada)

Tribunal member: Denis Bourgeois

Type of hearing: In person

Hearing date: April 27, 2023

Hearing participant: Appellant

Decision date: June 6, 2023

File number: GE-22-3671

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

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

Overview

[3] The Appellant works on a casual basis with the Province of New Brunswick Regional Health Authority. He was suspended from his job without pay on November 13, 2021. The Appellant's employer said that he was suspended because he did not comply with their vaccination policy.² He refused to give his vaccination status.

[4] Although the Appellant does not dispute that this happened, he says that he was not suspended. He says the employer told him that they would no longer call him unless he provided them with a proof of vaccination.³ He says he cannot be suspended because he is not an employee.

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

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

² See GD3-16 and GD3-36.

³ See GD6-2.

Matter I have to consider first

I accepted documents at the hearing as well as documents sent in after the hearing.

[6] The Appellant submitted documents at the hearing. He also sent documents after the hearing. I accepted these as the appellant provided new information.

Issue

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

Analysis

[8] To answer the question 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.

Was the Appellant an employee?

[9] The Appellant says he could not be suspended because he was not an employee. He says he has no seniority, no vacation, and no sick leave. He says that regular or part-time employees enjoy these. He says he is a casual worker that is on call.⁴

[10] I disagree with the Appellant.

[11] He was regularly paid for work with his employer. The record of employment that he submitted shows that he was paid for 21 out of 26 pay periods between November 27, 2020, and November 20, 2021.

[12] The *Employment Insurance Act* (Act) excludes casual employment from insurable employment but does not otherwise make a distinction between casual and part-time employment. Neither the Act nor the Regulations define what is meant

⁴ See GD6-7.

by casual employment.⁵ Whether he was a casual or part-time employee was not an issue in this appeal. The fact is that he was an employee as the employer was regularly paying him.

Why was the Appellant suspended from his job?

[13] I find that the Appellant was suspended from his job because he did not comply with the employer's vaccination policy.

[14] The Commission says the Appellant was suspended from his job. It says he was suspended from his job because he did not provide proof of vaccination as required by the policy. It says that he did not have an approved exemption.

[15] Although the Appellant does not dispute that this is the reason he was suspended, he says that he was suspended without just cause. He says that he should have been exempted due to his religious beliefs.

[16] The Appellant says that his employer communicated that all employees had to be fully vaccinated as outlined in their COVID-19 policy.⁶ The employer told the Commission that employees needed to be fully vaccinated by November 1, 2021. The Appellant confirmed that he had been warned that he would be suspended if he did not comply.⁷ He was suspended without pay on November 13, 2021.

[17] The Appellant said that he did not have any exemption to the vaccine policy.⁸ I accept this statement as a fact. He said that his vaccination status is private medical information. He is strongly opposed to any policy which would force him to accept a medical intervention (experimental) that to which he does not consent.⁹

⁵ See *H.A. v Canada Employment Insurance Commission (CEIC)*, SST 520, 2019.

⁶ See GD12-3.

⁷ See GD3-37.

⁸ See GD3-37.

⁹ See GD12-5.

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

[18] I find the reason for the Appellant's suspension is misconduct under the law.

[19] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹⁰ Misconduct also includes conduct that is so reckless that it is almost wilful.¹¹ The Appellant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.¹²

[20] 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.¹³

[21] 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.¹⁴

[22] The Commission says that there was misconduct because the Appellant knew that not complying to the newly implemented policy would lead to his suspension.

[23] The Appellant says that there was no misconduct because the employer changed the terms of his employment to require that he submit proof of COVID-19 vaccinations. He says that his medical history is confidential information. He says he does not want to disclose it for the sole purpose of demonstrating compliance with the employer's policy.

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

¹¹ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹² See *Attorney General of Canada v Secours*, A-352-94.

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁴ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[24] The Appellant says that he should not have to give consent to an experimental process on religious grounds. His Bible tells him not to perform cuttings into his skin nor to inject Pharmakia or harmful substances.

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

[26] First, the Appellant's refusal of disclosing his vaccination status was wilful. He was informed of the policy and given time to comply.¹⁵ He knew that he would be suspended if he did not comply. In his case, being suspended meant not being called into work, as he was a casual employee. His refusal to comply with the policy was the direct cause of his suspension. He has never denied this fact. This was conscious, deliberate, and intentional. There is no evidence that shows that the employer had no right to apply and enforce its vaccination policy. There is no evidence that shows that the employer violated any terms of the Appellant's contract. The Appellant knew of the policy and what would happen if he did not comply to it.

[27] Second, the Appellant knew or should have known that his non-compliance could get in the way of carrying out his duties toward his employer. It would be obvious to the Appellant that if he were suspended, he would not be allowed to go to work, and so he could not carry out any of his duties toward the employer. It is well established that a deliberate violation of an employer's policy is considered misconduct within the meaning of the Act.¹⁶ At the hearing, the Appellant confirmed there would have been plenty of work for him during his suspension.

[28] Finally, the Appellant mentioned his religious objections to being vaccinated in supplementary documentation sent after receiving the Commission's arguments.¹⁷ I agree with the Commission that there is no evidence that shows that the Appellant

¹⁵ See GD3-37.

¹⁶ See *Canada (Attorney General) v Bellavance* 2005 FCA 87; and *Canada (Attorney General) v Gagnon*, 2002 FCA 460.

¹⁷ See GD6-3.

asked for and received a religious exemption. The Appellant believes that he should have gotten a religious exemption because of his beliefs.

[29] The Tribunal's Appeal division has confirmed that the Tribunal is not the appropriate forum to discuss if an employer should have been given an exemption from a policy because of religious beliefs.¹⁸

[30] The Appellant argues that the vaccination policy was discriminatory. He says that it is discrimination because only employees were forced to be vaccinated.¹⁹ He says that the residents, new admissions, or visitors did not necessarily have to be vaccinated.

[31] While I do not have a copy of the policy, the Appellant gave the Commission two copies of two letters from his employer. These are titled: "Amended COVID-19 **Employee** Vaccination Policy in Vulnerable Settings" and "Amended COVID-19 Vaccination Policy for GNB **Employees**."²⁰ The policy was targeted at employees **only**. As he was an employee, he had to comply with the policy. I do not have to decide if I agree or disagree with the employer's policy. The law says I do not have to consider how the employer behaved. Instead, I have to focus on what the Appellant did or did not do and whether that is misconduct under the Act.²¹

[32] This case is about misconduct under the Act. The argument that the policy is discriminatory is not for the Tribunal to decide in this case. The Appellant said he did not leave his job voluntarily. He also said that he did not take a leave from his job. The concept of just cause from paragraph 29(c) does not apply. The Appellant can seek a remedy from the Canadian Human Rights Commission or the Canadian Rights Tribunal.

¹⁸ See *DK v CEIC*, SST 7, 2023.

¹⁹ See GD8-1.

²⁰ See GD3-32 to GD3-34.

²¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282 and *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[33] The Appellant is very passionate about his views about his personal medical information and the COVID-19 vaccinations and related policies. I have no doubt that he acted in good faith and that he did what he felt was the right thing to do.

[34] The Appellant made a choice not to divulge his vaccination status. This was the direct cause of his suspension. The choice of him being vaccinated or not remained his own.

[35] In a case called *Parmar*, the Supreme Court of British Columbia ruled that mandatory vaccination policies do not force an employee to be vaccinated. It said that they force a choice between getting vaccinated, and continuing to earn an income, or remaining unvaccinated, and losing their income.²²

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

[36] Based on my findings above, I find that the Appellant was suspended from his job because of misconduct.

Conclusion

[37] The Commission has proven that the Appellant was suspended from his job because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[38] This means that the appeal is dismissed.

Denis Bourgeois
Member, General Division – Employment Insurance Section

²² See *Parmar v Tribe Management Inc.*, 2022 British Columbia Supreme Court 1675.