



Citation: *PZ v Canada Employment Insurance Commission*, 2023 SST 1200

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: P. Z.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (478667) dated June 2, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: In person

Hearing date: January 17, 2023

Hearing participant: Appellant

Decision date: January 25, 2023

File number: GE-22-2455

Decision

[1] I am dismissing the appeal, with modification to the end date of the disentitlement.

[2] I disagree with P.Z. He is the Appellant (Claimant).

[3] The Canada Employment Insurance Commission (Commission) has shown the Claimant was suspended because of misconduct (in other words, because he did something that caused him to be suspended).

[4] The Claimant returned to work on January 10, 2022. This means the Claimant is disentitled from Employment Insurance (EI) benefits, during the period of his suspension, from December 13, 2021, to January 7, 2022.¹

Overview

[5] The Claimant worked as a Registered Nurse at a hospital, for the provincial health services. The employer put him on unpaid leave (suspended him) because he didn't comply with their COVID-19 vaccination policy.

[6] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

[7] At first, the Commission determined the Claimant stopped working by voluntarily taking a period of leave from his job. Upon reconsideration, the Commission changed its decision to say the Claimant was suspended. The Commission accepted the employer's reason for the suspension. It decided the Claimant was suspended because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits.

¹ Section 31 of the *Employment Insurance Act* (EI Act) says a claimant who is suspended due to misconduct is disentitled from benefits until they return to their employment or are dismissed. The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid or payable.

Matters I have to consider first

Potential added party

[8] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Issues

[9] Was the Claimant 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 suspended you.²

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

Why was the Claimant suspended?

[12] Both parties agree the Claimant was put on leave without pay (suspended) because he refused to be vaccinated by the deadline set out in the employer's mandatory COVID-19 vaccination policy.

[13] There is nothing in the file that would make me find otherwise. So, I find the Claimant was suspended from his job because he refused to be vaccinated in accordance with the employer's COVID-19 vaccination policy.

² See sections 30 and 31 of the Act.

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

[14] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[15] To be misconduct, the conduct has to be wilful. This means the Claimant's conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴

[16] The Claimant 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.⁵

[17] There is misconduct if the Claimant knew or should have known that his conduct could get in the way of carrying out the duties toward his employer and there was a real possibility of being suspended or let go because of that.⁶

[18] The Commission has to prove the Claimant was suspended or lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not, the Claimant was suspended or lost his job because of misconduct.⁷

[19] The Commission says there was misconduct for the following reasons:

- The Claimant was aware that all employees were required to provide proof of being fully vaccinated by November 30, 2021. This was extended to December 12, 2021.

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- The Claimant confirmed he was given plenty of notice that he would have to be vaccinated to continue working at the hospital.
- The Claimant knew he would be placed on unpaid leave (suspended) if he failed to disclose that he was fully vaccinated.
- The Claimant refused to be vaccinated so he was suspended. His last day worked was December 8, 2021.

[20] The Claimant says he had about 1-month's notice that he would be put on unpaid leave (suspended) if he didn't comply with getting fully vaccinated. He requested religious exemption, but it was denied. He appealed that refusal to grant him a religious exemption, but his appeal was denied.

[21] The Claimant says his actions aren't misconduct because

- he didn't act in an unethical way;
- he wasn't negligent when caring for the patients;
- he has a good work record; and
- he didn't have any disciplinary issues.

[22] The Claimant says the employer's policy is not morally correct or legal. He argued that either he has political and religious freedoms, or he doesn't. It's his body so it's his choice. He filed a grievance through his union. He returned to work on January 10, 2022.

[23] The law doesn't say I have to consider how the employer behaved when determining misconduct for the purpose of EI benefits⁸ Instead, I have to focus on what

⁸ See section 30 of the EI Act.

the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.⁹

[24] The Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer's conduct at issue. Such issues may be dealt with in other forums.¹⁰

[25] It is also important to know that I can't make any decisions about whether the Claimant had other options under other laws. Issues about whether the Claimant was wrongfully suspended or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide.¹¹ I can consider only one thing: whether the Claimant's actions or inaction is misconduct under the EI Act.

[26] I find the Commission has proven misconduct because the Claimant's refusal to be vaccinated was deliberate or intentional. The Claimant was clearly warned that he would be placed on unpaid leave, or prevented from working (suspended), if he failed to get vaccinated against COVID-19. There was a cause-and-effect relationship between his refusal to be vaccinated and the suspension. So, I find the Claimant was suspended from his job because of misconduct.

[27] The claim (benefit period) was effective December 12, 2021. The Claimant returned to work on Monday, January 10, 2022. This means the Claimant is disentitled from receiving EI benefits from Monday, December 13, 2021, to Friday, January 7, 2022.¹²

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

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

¹² The disentitlement is imposed on workdays (Monday through Friday) for which benefits may be paid or payable.

Conclusion

[28] The Commission has proven the Claimant was suspended because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[29] The appeal is dismissed, with modification to the end date of the disentitlement.

Linda Bell

Member, General Division – Employment Insurance Section