



Citation: *ED v Canada Employment Insurance Commission*, 2023 SST 247

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

Decision

Appellant: E. D.

Respondent: Canada Employment Insurance Commission

Decisions under appeal: Canada Employment Insurance Commission reconsideration decisions (546003 and 537325) dated October 13, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Type of hearing: In person

Hearing date: July 20, 2023

Hearing participant: Appellant

Decision date: July 27, 2023

File number: GE-22-3603, GE-22-3604

Decision

[1] E. D. is the Appellant. The Canada Employment Insurance Commission (Commission) says he can't get Employment Insurance (EI) benefits. The Appellant is appealing this decision to the Social Security Tribunal (Tribunal).

[2] I am dismissing the Appellant's appeal. I find that the reason for his suspension is misconduct under the meaning of the law. This means he can't get EI benefits while he was on unpaid leave.

[3] I also find that I don't have the authority to make any decisions about whether he has just cause for quitting his job. This is because the Commission has only made its initial decision on this issue. The Commission hasn't made any reconsideration decisions about this issue yet. The law only lets me hear an appeal on an issue after the Commission has reconsidered it first. The Appellant should ask the Commission for a reconsideration if he disagrees with the Commission's decision about whether he has just cause for leaving his job.

Overview

[4] The Appellant's employer introduced a COVID-19 vaccination policy. Under the policy, the employer expected all employees to either show proof of vaccination against COVID-19 or have an approved exemption from the policy. The Appellant asked for an exemption from the policy, but the employer refused his request. This meant that his employer expected the Appellant to show proof of vaccination against COVID-19, but the Appellant didn't do this. So, the employer put him on an unpaid leave of absence. After about six months on unpaid leave, the Appellant resigned.

[5] The Commission says the unpaid leave of absence means the employer suspended the Appellant. The Commission says the reason for the suspension is misconduct. This is because the Commission says the Appellant knew about the policy and knew the employer would suspend him if he didn't follow the policy. The Commission says he acted deliberately when he chose not to follow the employer's policy.

[6] The Commission also says that I don't have the authority to make any decisions about whether the Appellant had just cause for leaving his job in July 2022. This is because the Commission says it hasn't yet reconsidered this issue.

[7] The Appellant hasn't made any arguments about whether I have the authority to make decisions on whether he had just cause for leaving his job. But he says that the reason for his suspension isn't misconduct. He says he has the right to make his own decisions about vaccination. He doesn't believe that the COVID-19 vaccine is safe or effective.

Matter I have to consider first

The Appellant and the Commission agree about the start date of the Appellant's benefit period

[8] The Appellant applied for EI benefits about three months after his last day of work. He asked the Commission to treat his application as if he made it right after his last day of work. The Commission calls this antedating an application.

[9] The Commission originally refused to antedate the Appellant's application. But during the reconsideration process, the Commission changed its decision. It decided to antedate the Appellant's application and treat it as if he applied right after his last day of work.

[10] When the Appellant filed his appeal with the Tribunal, he included the reconsideration letter with the antedate decision. This meant that the Tribunal created an appeal for the antedate issue. But at the hearing, the Appellant said he didn't want to appeal the Commission's decision about antedating his application. He said he agreed with the Commission's decision to start his benefit period right after his last day of work.

[11] So, I won't make any decisions about whether the Appellant has good cause for his late EI benefits application. The Commission's decision to antedate the Appellant's application to his last day of work will remain in place.

Issue

[12] First, I have to decide if the reason the Appellant stopped working is misconduct. In other words, did his employer suspend him because of misconduct?

[13] Then, I will look at the Appellant's resignation. I will decide if I have the authority to hear an appeal on this issue.

Analysis

Misconduct

[14] The law says you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has suspended or dismissed you.¹

[15] And to answer the question of whether the Appellant stopped working because of misconduct, I have to decide two things. First, I have to determine why the Appellant stopped working. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant stop working?

[16] The Commission says the Appellant stopped working because of a suspension. The Commission says his employer suspended him because he didn't follow its COVID-19 vaccination policy.

[17] The Appellant says his employer put him on an unpaid leave of absence. He agrees that this is the same as a suspension. He also agrees that the reason for the suspension is because he didn't follow the employer's COVID-19 policy. He didn't show his employer proof of vaccination and he didn't have an approved exemption from the policy.

¹ Section 30 of the *Employment Insurance Act* says you are disqualified from receiving benefits if you are dismissed because of misconduct. Section 31 of the *Employment Insurance Act* says you are disentitled from receiving benefits if you are suspended because of misconduct.

[18] So, both the Appellant and the Commission agree that the Appellant stopped working because of a suspension. His last day of work was January 29, 2022. He told the Commission that he resigned on July 27, 2022. I find that this means the Appellant's suspension runs from January 29 to July 27, 2022.

[19] The Appellant and the Commission agree that the reason for the suspension is because of the employer's COVID-19 vaccination policy.

[20] So, now I must decide if the Appellant's actions – failing to follow his employer's COVID-19 vaccination policy – are misconduct under the meaning of the law.

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

[21] I find that the reason for the Appellant's suspension is misconduct under the meaning of the law.

[22] 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

[23] 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 a suspension because of that.⁵

[24] The Commission has to prove that the Appellant stopped working because of misconduct. The Commission has to prove this on a balance of probabilities. This

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.

means that it has to show that it is more likely than not that the Appellant stopped working because of misconduct.⁶

[25] The Commission says the reason for the Appellant's suspension is misconduct. The Commission says he knew about his employer's policy. He knew the employer was likely to suspend him if he didn't follow the policy. And the Commission says he acted deliberately when he decided not to follow the policy by showing proof of vaccination against COVID-19.

[26] The Appellant disagrees. He says he has the right to make his own decision about vaccination. He doesn't think the COVID-19 vaccine is safe or effective. He says he has contributed to the EI fund and should get benefits.

[27] I agree with the Commission. I find that the reason for the Appellant's suspension is misconduct under the meaning of the law.

[28] The Appellant and the Commission agree about most of the basic facts in this appeal.

[29] The Appellant's employer brought in a COVID-19 vaccination policy. The Appellant says he learned about the policy in October 2021. Under the policy, the employer expected all employees to either show proof of vaccination or have an approved exemption from the policy.

[30] The Appellant agrees that the employer told him that he could lose his job or face suspension if he didn't follow the policy. He asked for an exemption from the policy, but the employer refused his exemption request. The Appellant says his employer told him before the vaccination deadline that they were refusing his exemption request. He knew the employer now expected him to show proof of vaccination by the deadline.

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

[31] Even so, the Appellant chose not to get vaccinated against COVID-19 and so he didn't give his employer proof of vaccination by the deadline. He agrees that this is the reason the employer suspended him by putting him on an unpaid leave of absence.

[32] I can accept the above facts as true because the Appellant and the Commission agree on them. But if I accept these facts, then I have to find that the reason the Appellant stopped working is misconduct under the meaning of the law. This is because:

- The Appellant understood his employer's COVID-19 vaccination policy. He knew he had to show proof of vaccination or have an approved exemption by the deadline.
- He knew the employer was likely to suspend him if he didn't follow the policy.
- He knew the employer had refused his request for an exemption.
- Even so, he acted deliberately when he chose not to follow the policy and chose not to show his employer proof of vaccination.
- His actions – failing to follow the employer's COVID-19 vaccination policy – led to his suspension.

[33] So, this means that the reason for the Appellant's suspension is misconduct under the meaning of the law.

Voluntary Leaving

Do I have authority to hear an appeal on the issue of voluntary leaving?

[34] I find that I don't have authority to hear an appeal on the issue of voluntary leaving. This is because the Commission hasn't yet reconsidered its original decision.

[35] There is a process to follow when you disagree with a decision about your EI benefits. First, you have to ask the Commission to review its decision. This is called a

reconsideration.⁷ If you still disagree with the Commission's decision after the reconsideration, you can appeal to the Tribunal.⁸

[36] You can't skip the reconsideration step. You can't ask the Tribunal to make a decision about your EI benefits before the Commission reconsiders its decision. If the Tribunal tries to make a decision on an issue before the Commission does a reconsideration, then the Tribunal is exceeding its jurisdiction. This is an error. The Tribunal isn't allowed to do this.

[37] Another way of saying this is that the Tribunal doesn't have the authority to make a decision on an issue before the Commission does a reconsideration of that issue.

[38] The Commission says I don't have the authority to hear an appeal on the issue of voluntary leaving. It says it has only made an initial decision, but it hasn't made a reconsideration decision on this issue yet.

[39] At the hearing, I explained the Commission's arguments on this issue and asked the Appellant to reply. But he didn't make any specific arguments on this issue.

[40] So, I agree with the Commission. I think the evidence shows that the Commission hasn't made a reconsideration decision on this issue yet.

[41] I agree that the reconsideration decision letter includes information about the Commission's decision on the issue of voluntary leaving. But I think it is likely that this is a mistake. This is because there isn't any evidence in the appeal file that shows me that the Commission first made an initial decision and then a reconsideration decision on the issue of voluntary leaving.

[42] The Appellant told the Commission that he resigned from his job on July 27, 2022. And then he asked for a reconsideration on August 8, 2022. This shows me that it

⁷ Section 112 of the *Employment Insurance Act*.

⁸ Section 113 of the *Employment Insurance Act*.

is unlikely that the Commission had enough time to make an original decision and then a reconsideration decision on the issue of voluntary leaving.

[43] The Commission's records of conversation also show me that the Commission only learned that the Appellant had left his job while it was reconsidering its decision about whether the Appellant's employer suspended him for misconduct.

[44] So, even though the Commission used the reconsideration decision letter to notify the Appellant of its decision about whether he had just cause for leaving his job, I find it likely that this was the Commission's first decision on this issue.

[45] And there isn't any evidence that shows me that the Commission went through the process of reconsidering this original decision about voluntary leaving. There isn't any evidence showing me that a second Commission officer has reviewed the decision. There isn't any evidence showing me that a new Commission officer has gathered information from the Appellant or his employer about whether he chose to leave his job, nor whether he had just cause for leaving his job.

[46] Without a reconsideration decision, I don't have the authority to hear an appeal on the issue of voluntary leaving. So, I am not going to look at the issue of voluntary leaving in this decision.

[47] If the Appellant disagrees with the Commission's decision about voluntary leaving, he can ask the Commission for a reconsideration. If he still disagrees with the Commission's decision after a reconsideration, he can bring a new appeal to the Tribunal.

Conclusion

[48] I am dismissing the Appellant's appeal. I find that he stopped working because his employer suspended him. And I find that the reason for his suspension is misconduct under the meaning of the law. This means that he isn't entitled to EI benefits during his suspension – January 29 to July 27, 2022.

[49] I am not going to make any decisions about whether the Appellant quit his job, nor whether he had just cause for quitting his job. This is because I find that the Commission hasn't yet reconsidered its original decision on this issue. I don't have the authority to make any decisions on this issue until the Commission has first reconsidered its original decision.

Amanda Pezzutto

Member, General Division – Employment Insurance Section