



Citation: *AD v Canada Employment Insurance Commission*, 2023 SST 1395

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

Decision

Appellant: A. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (541072) dated October 24, 2022 (issued by Service Canada)

Tribunal member: Paula Turtle

Type of hearing: Teleconference

Hearing date: April 11, 2023

Hearing participant: Appellant

Decision date: April 25, 2023

File number: GE-22-3921

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 employment because of misconduct (in other words, because he did something that caused him to be suspended from his job).

[3] This means that the Appellant is disentitled from receiving Employment Insurance (EI) benefits because he was suspended.¹

[4] When an appellant is suspended, their disentitlement continues until the appellant loses their employment.² The Appellant lost his employment on March 30, 2022. There is a separate decision that deals with the Appellant's loss of employment.

Overview

[5] The Appellant worked as a property and lease administrator. Most of his work was in his employer's head office.

[6] The Appellant's employer says that he was suspended because he went against its vaccination rule: he didn't get vaccinated.

[7] The Appellant says that his employer should have given him a choice about getting vaccinated. He says that going against his employer's vaccination rule isn't misconduct.

[8] 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 disentitled from receiving EI benefits.

¹ See section 31 of the *Employment Insurance Act*.

² See section 31(b) of the Act.

Issue

[9] Was the Appellant suspended 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 let you go or suspended you.

[11] To answer the question of whether the Appellant was suspended from his job because of misconduct, I have to decide two things.

[12] 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.

The Appellant was suspended because he did not get vaccinated

[13] The employer put the Appellant on an unpaid leave of absence because he did not get vaccinated. An unpaid leave of absence is the same as a suspension.

[14] In June 2021 the employer brought in a rule. The rule said the employees had to be vaccinated by December 1, 2021. Employees who were not vaccinated would be put on leave without pay.

[15] The Appellant told the employer he did not get vaccinated.

[16] The Appellant was put on an unpaid leave of absence on November 30, 2021. He did not do any work for the employer after that date. But he was not fired, either.

[17] I find that the Appellant was suspended from his job because he did not get vaccinated.

The reason for the Appellant's suspension is misconduct under the law

[18] The Appellant's decision not to get vaccinated is misconduct under the law.

[19] *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.

[20] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[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.⁶

[22] The Commission has to prove that the Appellant was suspended 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 because of misconduct.⁷

[23] The Commission says that there was misconduct because the Appellant knew his employer had a vaccination rule. He knew he would be suspended if he did not get vaccinated.

[24] The Appellant says that there was no misconduct because he told his employer he would do other things instead of getting vaccinated. The Appellant did not ask to be excused from the vaccination rule. He said he would do these things:

- He would take rapid antigen tests regularly.

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.

- He would continue to work from home.
- He would come to the office in the evenings when other workers were not there.

[25] His employer did not agree with the Appellant's suggestions.

[26] The Appellant asks me to apply another Tribunal decision.⁸ He says it means that he does not have to show just cause for taking a leave of absence. But that case was different because the Commission found that the appellant was on a leave of absence. It did not find the appellant had been suspended, like it did with the Appellant in this case.

[27] The Appellant argues that the employer's decision to suspend him was unfair.

[28] The Appellant argues that employees have a right to refuse vaccinations. He told me the Tribunal said this in another case.⁹ He asks me to apply that principle here. I have read the decision carefully. I think there are good reasons not to apply that case to the Appellant's situation, including these ones:

- The appellant in the other case had a collective agreement that said employees had a right to refuse vaccinations. The Appellant did not have a collective agreement.
- I am not bound by decisions of other Tribunal members. That decision has not yet been considered by the Appeal Division or by the Courts. So, I will follow the line of cases that says it is not my job to decide whether an employer's rule is fair or reasonable.

[29] The Appellant asked me if he could give me a newspaper story. He sent it to me after the hearing. I have read it. The story is about an employee with a collective agreement. An arbitrator decided the employer should not have fired a worker who did

⁸ See *CO v Canada Employment Insurance Commission* 2022 SST 1066.

⁹ See *AL v Canada Employment Insurance Commission* 2022 SST 1428.

not get vaccinated. But the arbitrator says the employer could have put the worker on an unpaid leave. So it does not help the Appellant's argument about his suspension.

[30] The courts have said that it is not for the Tribunal to consider whether someone's rights have been violated because of an employer rule when we decide whether someone has been suspended for misconduct. If an appellant thinks their rights have been violated, there are other places where they can file a complaint.¹⁰

[31] The Appellant's employer gave him a good reference letter when he was put on the leave of absence. The Appellant says this shows he did not commit misconduct.

[32] A good reference letter does not mean there was no misconduct. Misconduct includes an appellant not following his employer's rule if he knows that his decision could get in the way of carrying out his duties toward his employer and that there is a real possibility of being suspended or let go because of that. The Appellant could still otherwise be good at his job and get a good reference letter even though he did not follow a rule.

[33] I find that the Commission has proven that there was misconduct, because the Appellant knew he would be suspended if he did not get vaccinated. And he made a deliberate choice not to get vaccinated.

So, was the Appellant suspended because of misconduct?

[34] Based on my findings above, I find that the Appellant was suspended because of misconduct.

Conclusion

[35] The Commission has proven that the Appellant was suspended because of misconduct. Because of this, the Appellant is disentitled from receiving EI benefits for the time that he was suspended from employment.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[36] This means that the appeal is dismissed.

Paula Turtle

Member, General Division – Employment Insurance Section