



Citation: *FA v Canada Employment Insurance Commission*, 2023 SST 2023

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

Decision

Appellant: F. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (557415) dated December 7, 2022 (issued by Service Canada)

Tribunal member: John Noonan

Type of hearing: In person

Hearing date: October 24, 2023

Hearing participants: Appellant

Decision date: November 5, 2023

File number: GE-23-82

Decision

[1] The appeal is dismissed.

[2] The Tribunal disagrees with the Appellant.

[3] The Canada Employment Insurance Commission (Commission) has proven that the Appellant was placed on leave because of misconduct (in other words, because he/she did something that caused him to not be able to continue his job). This means that the Appellant is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[4] A claim for employment insurance benefits was established by the Appellant, F. A., effective July 31, 2022. This claim was, on September 2, 2022 denied as the Canada Employment Insurance Commission (Commission) determined that the Appellant was disqualified from receiving benefits because he had lost his employment due to his own misconduct on November 15, 2021. The Appellant sought and was granted a reconsideration of this decision resulting in the Commission maintaining its original decision. (GD3 – 74). He then appealed to the Social Security Tribunal. The Tribunal must decide if the Appellant committed the act in question and, if so, did his actions constitute misconduct. The results will determine eligibility for benefits under the Employment Insurance Act (Act).

[5] The Appellant's employer says that he was suspended / placed on a leave of absence because he went against its vaccination policy: he didn't get vaccinated.

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

[7] The Commission accepted the employer's reason for the leave. It decided that the Appellant was placed on leave because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Matters I have to consider first:

[8] In this case the Appellant was not dismissed from his employment for not getting vaccinated as per the employer's mandate. Rather he was placed on a leave of absence which had the same effect as a suspension as he was not allowed to travel therefore was not able to attend his employment by his choice.

[9] Many of the court rulings cited in this decision refer to dismissal but I note they have the same effect regarding leaves and or suspensions under the Act.

Issues

[10] Issue # 1: Was the Appellant placed on leave because of misconduct?

Issue #2: If so, did he do so wilfully to the point he could reasonably expect to be placed on leave / suspended from his employment for his actions?

Analysis

[11] The relevant legislative provisions are reproduced at GD4.

[12] The Act does not define "misconduct". The test for misconduct is whether the act complained of was wilful, or at least of such a careless or negligent nature that one could say that the employee wilfully disregarded the effects his or her actions would have on job performance. (**Tucker A-381-85**)

[13] Tribunals have to focus on the conduct of the claimant, **not the employer**. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (**McNamara 2007 FCA 107; Fleming 2006 FCA 16**).

[14] The employer and the Commission must show that claimant lost his/her employment due to misconduct, the decision to be made on the balance of probabilities (**LARIVÉE A-473-06, FALARDEAU A-396- 85**).

[15] There must be a causal relationship between the misconduct of which a claimant is accused and the loss of their employment. The misconduct must cause the loss of employment, and must be an operative cause. In addition to the causal relationship, the misconduct must be committed by the claimant while employed by the employer, and must constitute a breach of a duty that is express or implied in the contract of employment (**Cartier 2001 FCA 274; Smith A-875-96; Brissette A-1342-92; Nolet A-517- 91**).

[16] The law says that you can't get EI benefits if you cannot do your job because of misconduct. This applies when the employer has placed you on leave or suspended you.

[17] 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 was placed on leave. Then, I have to determine whether the law considers that reason to be misconduct.

Issue 1: Was the Appellant placed on leave because of misconduct?

[18] Yes.

[19] The Appellant was placed on leave because of misconduct. The Appellant's employer said he was placed on a leave of absence because he didn't comply with their policy to be fully vaccinated or have an exemption approved.

[20] The Appellant doesn't dispute that this happened but he says it was not a vaccine that he trusted or, in his opinion, was approved.

[21] His employer had to adhere with DND vaccination policy as they were a subcontractor working on a federal site.

[22] When he failed to provide proof of vaccination as required by the employer he was not brought back to work but rather placed on a leave of absence until the employer's contract ran out and the Appellant was issued a new ROE stating lack of work as of July 31, 2022.

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

[24] I find the Appellant did breach the employer's vaccination policy which led to his suspension.

Issue #2: If so, did he do so wilfully to the point he could reasonably expect to be placed on leave / suspended from his employment for his actions?

[25] Yes.

[26] Tribunals have to focus on the conduct of the claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the claimant such that this would constitute unjust dismissal, but whether the claimant was guilty of misconduct and whether this misconduct resulted in losing their employment (**McNamara** 2007 FCA 107; **Fleming** 2006 FCA 16).

[27] The proof of a mental element is necessary. The claimant must have a deliberate behaviour or so reckless as to approach wilfulness (**McKay-Eden** A-402-96; **Jewell** A-236-94; **Brissette** A-1342-92; **Tucker** A-381-85; **Bedell** A-1716-83)

[28] A Tribunal must have the relevant facts before they can conclude misconduct and sufficiently detailed evidence for it to be able, first, to know how the claimant behaved, and second, to decide whether such behaviour was reprehensible (**Meunier** A-130-96; **Joseph** A-636-85).

[29] The word "misconduct" is not defined as such in the case law. It is largely a question of circumstances (**Gauthier** A-6-98; **Bedell** A-1716-83).

[30] All the evidence must be analysed before concluding of misconduct (**Ryan** 2005 FCA 320).

[31] The Appellant was notified several times regarding his need to be vaccinated by the employer.

[32] The Appellant stated he was not suspended from his position because he was on a leave of absence, until the contract ended at the end of July 2022. When contract ended, it should be lay off/shortage of work. (GD3-69 to GD3-70)

[33] The Appellant chose not to follow the vaccine mandate of the employer. The employer then exercised its right to not bring the Appellant back to the jobsite.

[34] The reason for the Appellant's leave is misconduct under the law.

[35] The Appellant. at his hearing, presented very detailed testimony regarding his position regarding the mandated vaccine policy.

[36] He had not requested an exemption to the mandate.

[37] Additionally, he presented testimony regarding his trade and long-term work as a pipefitter.

[38] The Appellant was made aware of the mandate and the fact that all travel required vaccination or an exemption. As he lived in NL and worked in Northern Canada, air travel was required but he chose to not get vaccinated therefore was not allowed to fly.

[39] The concept of Misconduct under the EI Act was discussed at great length with the Appellant and he fully understood that the Tribunal was restricted to making a decision on this only.

[40] 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 actions constitute misconduct under the Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[41] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional. Misconduct also includes conduct that is so reckless that it is almost wilful. 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.

[42] 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 let go because of that.

[43] The law doesn't say I have to consider how the employer behaved. Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.

[44] I have to focus on the Act only. I can't make any decisions about whether the Appellant has other options under other laws. Issues about whether the Appellant was wrongfully placed on leave or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide. I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[45] The Commission has to prove that the Appellant lost 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 placed on leave because of misconduct.

[46] The Appellant does not deny he was placed on leave due to the employer's vaccine mandate but denies his actions constitute misconduct.

[47] I find the Appellant does meet the mental element of willfulness inherent in a finding of misconduct. His submissions show clearly that he was aware of the consequences of not getting vaccinated, not being able to fly to the worksite, by the employer's deadline but chose to not be vaccinated anyway.

[48] The Federal Court found that, for misconduct to arise, it was unnecessary that there was a breach of the employment contract. Misconduct could arise even if there was a breach of a policy that did not form part of the original employment contract.

[49] The Federal Court also found that the employer could introduce a policy that required vaccination even if it did not form part of the original contract. It found that there was misconduct if employees knowingly failed to abide by that policy and were aware of the consequences that would result.

[50] In this case the Appellant was aware of the travel restrictions if he were not vaccinated therefore his inability to return to work.

[51] The courts have consistently stated, the test for misconduct is whether a claimant intentionally committed an act (or failed to commit an act), contrary to their employment obligations. It is a very narrow and specific test for determining whether misconduct arose.

[52] The employer and the Commission have shown that the Appellant was placed on leave due to misconduct, the decision being made on the balance of probabilities
LARIVEE A-473-06, FALARDEAU A-396- 85.

[53] Therefore I find that it would be probable to conclude misconduct on the part of the Appellant. There should be a disqualification.

Conclusion

[54] The Tribunal "Must conduct an assessment of the facts and not simply adopt the conclusion of the employer on misconduct. An objective assessment is needed sufficient to say that misconduct was in fact the cause of the loss of employment"
(Meunier A-130-96).

[55] In having done so, the Member finds that, having given due consideration to all of the circumstances, the Appellant's actions in this case were deliberate and willful to the point where he knew they would / could lead to his not being allowed to travel thereby not able to attend work therefore they do amount to misconduct under the Act therefore the appeal is dismissed. Therefore he is not entitled to receive EI benefits.

John Noonan

Member, General Division – Employment Insurance Section