



Citation: *TN v Canada Employment Insurance Commission*, 2024 SST 362

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

Decision

Appellant: T. N.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (479902) dated June 24, 2022 (issued by Service Canada)

Tribunal member: Nathalie Léger

Type of hearing: Videoconference

Hearing date: April 4, 2024

Hearing participant: Appellant

Decision date: April 10, 2024

File number: GE-23-1641

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 without pay 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 lost his job. The Appellant's employer says that he was suspended because he went against its vaccination policy: he didn't say whether he had been vaccinated.

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

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

Preliminary note

[6] It has been difficult to obtain full participation from the Appellant throughout this case. Questions were often left unanswered or answered only with reluctance.² Numerous requests for postponements were presented and granted.

[7] At this second hearing for the same matter, the Appellant read a prepared statement and agreed only with hesitation to answer questions stemming from this statement.

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

² See for example GD3-19, GD3-26.

[8] This makes my job, as a Tribunal member, much more difficult. This issue is very fact specific, and details are important. But my role is to assess the evidence that has been brought before me. That is what I will do in the rest of this decision.

Issue

[9] Was the Appellant suspended without pay because of misconduct?

Analysis

[10] The law says that you can't get EI benefits if you lose your job or are suspended without pay because of your own misconduct.³

[11] To decide this, 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.

Why was the Appellant suspended without pay?

[12] I find that the Appellant was suspended without pay because he went against his employer's vaccination policy. By refusing to disclose his vaccination status, the Appellant violated the employer's policy.

[13] The Appellant does not explicitly say why he was put on administrative leave. He only says that it was because he did not fully abide by his employer's policy. He also says that he was asked twice about personal medical information, namely his vaccination status. He refused to release the information asked by his employer because, in his view, this information is confidential and protected by privacy laws.

[14] At the hearing, he said that he had problems entering the information in the electronic system, as requested by the employer. He also said that he sent an email to his employer with his vaccination status. He refused to say if that meant he was unvaccinated. Also, he could not recall when this email was sent or when he tried to enter information in the system. There is therefore no evidence that he tried to do it

³ See sections 30 and 31 of the Act.

before the deadline. The fact that the Appellant sent an email to his director about his status does not change the reason why he was suspended.

[15] The Commission says that the Appellant was put on leave without pay (suspended) because he did not comply with the vaccination policy.

[16] All the information on file leads me to believe that the Appellant was suspended because he refused to disclose his vaccination status and, therefore, violated his employer's vaccination policy.

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

[17] The reason for the Appellant's dismissal is misconduct under the law.

[18] 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.

[19] Case law says that to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[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 let go because of that.⁷

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[21] The law doesn't say I have to consider how the employer behaved.⁸ The Federal Court of Appeal has recently reaffirmed that "the test for misconduct focuses on the employee's knowledge and actions, not on the employer's behaviour or the reasonableness of its work policies."⁹ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.¹⁰

[22] 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 dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Appellant aren't for me to decide.¹¹ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[23] 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 lost his job because of misconduct.¹²

[24] The Commission says that there was misconduct because the employer had a vaccination policy that had been communicated to all employees. The policy provided a deadline for employees to disclose their status. It provided that if employees did not comply, they would be placed on administrative leave without pay.¹³

[25] The Appellant recognizes that he had many conversations with his director about his obligation to act according to the policy. He was therefore aware of his obligations and of the consequences of not respecting them.

⁸ See section 30 of the Act.

⁹ See *Sullivan v Canada (Attorney General)*, 2024 FCA 7 at paragraph 4.

¹⁰ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

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

¹² See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹³ See GD4-5 and GD3-26 to 28.

[26] The Appellant says that there was no misconduct because the policy violated his right to privacy. Also, the obligation to tell his employer if he was vaccinated was never part of his contract of employment.

[27] The Appellant said as well that he told his employer that he needed to talk to his doctor before making a decision about what he considered a medical treatment. He says that he called his doctor “probably” early on in the process but that there was a 90 days’ delay to get an appointment.¹⁴ This meant he could not see his doctor before the deadline set in the policy.

[28] When asked if he informed his manager of this fact, he referred me to his written argumentation. The answer there is yes, he informed his manager of this fact. But when asked how his manager responded or when he informed his manager, the Appellant said he could not remember for two years have gone by since the events.

[29] Obviously, it is hard for me to evaluate the impact of this evidence on the finding of misconduct because so much of the context is unknown: when did the Appellant try to set up an appointment with his doctor? Did he inform the doctor of the deadline imposed on him by the policy? When did he inform his manager of the long wait to see his doctor? How did his manager react? Did he try to see another doctor?

[30] Furthermore, as I said previously, my focus must be on the Appellant’s conduct, not on the conduct of the employer.¹⁵ Therefore, it is not for me to decide if the employer should have given the Appellant more time to comply with the policy. It has no bearing on a finding of misconduct.

[31] I find that the Commission has proven that there was misconduct because

- the employer had a vaccination policy that placed the vaccination deadline as of October 29, 2021, and that as early as November 15, 2021, public servants who refused to disclose their status would be placed on administrative leave without pay;

¹⁴ See RGD29-1.

¹⁵ See *Sullivan v Canada (Attorney General)*, 2024 FCA 7.

- the employer clearly told the Appellant about what it expected of its employees in terms of getting vaccinated;
- the employer spoke to the Appellant several times to communicate what it expected;
- the Appellant knew or should have known the consequence of not following the employer's vaccination policy.

So, did the Appellant lose his job because of misconduct?

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

[33] This is because the Appellant's actions led to his suspension. He acted deliberately. He knew that refusing to say whether he had been vaccinated would lead to his suspension.

Conclusion

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

[35] This means that the appeal is dismissed.

Nathalie Léger
Member, General Division – Employment Insurance Section