Citation: *DG v Canada Employment Insurance Commission*, 2024 SST 838

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	D. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (542399) dated October 6, 2022 (issued by Service Canada)

Tribunal member:	Benson Cowan
Type of hearing:	In person
Hearing date:	January 29, 2024
Hearing participant:	Appellant
Decision date:	March 12, 2024
File number:	GE-22-3838

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant was suspended from his job for not complying with his employer's Covid-19 vaccination policy.

[4] The Commission decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

[5] The Claimant does not dispute that he was suspended because of his employer's vaccine policy. He says, however, that the policy was unlawful and that his actions were not misconduct.

Issue

[6] Was the Appellant suspended because of misconduct?

Analysis

[7] To answer the question of whether the Claimant was suspended from his job 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.

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[1] Section 31 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Why was the Claimant suspended from his job?

[8] I find that the Claimant was suspended because of his employer's COVID-19 vaccination policy.

[9] The Commission has not provided a copy of the policy in their materials. They apparently decided the Appellant's claim without reference to the actual language of the policy. This leaves many of the details around the Appellant's suspension unclear. However, the Commission did speak with the Appellant's employer. Initially, the employer's representative did not want to provide any information to the Commission. After a second call and some encouragement from the representative of the Commission, the employer's representative stated that the Appellant was placed on leave without pay "due to vaccine mandate" after he had twice asked for accommodation. The Employer said that the suspension was a voluntary leaving on the part of the Appellant.

[10] The Commission dismissed the Appellant's claim for benefits on the basis that he voluntarily left his employment without just cause. Upon reconsideration, the Commission denied the Appellant's claim for benefits because he was suspended for misconduct.

[11] The Appellant provided a copy of a document called the Framework for the Implementation of the Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police.[2] He also provided a copy of a document called the Policy on COVID-19 Vaccination for the Core Public Administration Including the Royal Canadian Mounted Police.[3] Read together, these provide some much needed context to understand the Appellant's suspension.

[12] In accordance with the terms of the policy, the Appellant agrees that he was suspended because he was not vaccinated. He sought religious accommodation and was unsuccessful. He complied with all of the terms of the policy regarding reporting his

[2] See GD2 41-59
[3] See GD2 64-76

status to his employer. But he was not vaccinated and was suspended on February 11, 2022.

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

[13] The reason for the Claimant's dismissal is misconduct under the law.

[14] It is unfortunate that the Act uses the term misconduct. The everyday usage of the word implies conduct that is inherently wrong or bad. Indeed, the Federal Court of Appeal has previously characterised the actions amounting to misconduct as being "reprehensible". [4]

[15] Regardless of what one might think of the Appellant's reasons for not getting vaccinated, his actions were not reprehensible in the least. He was direct and honest with his employer. He followed the terms of the policy in respect of disclosing his status and seeking accommodation.

[16] In more recent decisions, the Federal Court of Appeal has moved away from the characterisation of misconduct as being reprehensible. It has interpreted misconduct to mean simply an "employee's violation of an employment rule".[5] Very recently, the Court affirmed that the test for misconduct does not involve an assessment of the employer's conduct and the question is whether the employee consciously, deliberately, or intentionally violated the employer's policy.[6]

[17] To be misconduct under the law, the conduct has to be wilful and violate an employer's policy. This means that the conduct was conscious, deliberate, or intentional.[7] Misconduct also includes conduct that is so reckless that it is almost wilful.[8] 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.[9]

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[4] See *Attorney General of Canada v Secours*, A-352-94.
[5] See *Cecchetto v. Canada (Attorney General*), 2023 FC 102
[6] See *Spears v. Canada (Attorney General*), 2024 FC 329
[7] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[8] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[9] See *Attorney General of Canada v Secours*, A-352-94.

[18] There is misconduct if the Claimant 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 or suspended because of that.[10]

[19] The Commission has to prove that the Claimant 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 Claimant lost his job because of misconduct.[11]

[20] The Commission says there was misconduct because the Appellant was suspended for not getting vaccinated in accordance with his employer's policy. I have to say that the failure of the Commission to provide a copy of the policy in this case is concerning. It suggests that they made the decision on the Appellant's original claim and the reconsideration without an adequate record. In making this argument in their written submissions, they rely on the copy of the policy provided by the Appellant.

[21] The Appellant says that there was no misconduct for two reasons. First, he says that the policy should not be enforced because it is unlawful. He provided extensive written submissions on this issue. Second, he says that his actions could not be misconduct because his employer and his collective agreement specified precisely what misconduct was and had a specific set of policies governing the determination of whether an action could be considered misconduct.

[22] With respect to the unlawfulness of the policy, the Appellant made several arguments that the policy should be considered unlawful. I appreciate that the Appellant disagrees with the policy and feels strongly that it violated his rights. These are not arguments that I can consider in this appeal, however. The policy was implemented by his employer and its terms were communicated to the Appellant. He may have found it objectionable, but he knew that he faced a likely suspension if he did not get vaccinated.

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[10] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[11] See *Minister of Employment and Immigration v Bartone*, A-369-88.

[23] With respect to the issue of there being an existing comprehensive process for addressing misconduct, I found much of what the Appellant had to say interesting and worth careful consideration. He pointed out that the policy itself did not use the term misconduct and that his employer did not characterise the behaviour as misconduct in their discussion with the Commission. He also spent some time explaining the process that is followed for allegations of misconduct under his collective agreement and how that policy was not followed in this case. And he spent some time explaining the significant of the code his employer entered when he was placed on leave.

[24] As a whole, the gist of the Appellant's argument is that the terms of his employment have a comprehensive scheme for dealing with misconduct as provided for in his collective agreement. Accordingly, he says that neither the policy nor the Act can create an alternative process that ignores the collective agreement and the terms of his employment that were in place prior to the implementation of his employer's COVID-19 policy.

[25] There is much to consider in the Appellant's argument. The terms and conditions of his employment are provided for in his collective agreement. These include the processes that must be followed before an employee can be suspended. In this way the situation is different than for a non-unionised employee who may be subject to terms and conditions that may be changed by the employer. There are legitimate concerns with allowing a policy that has not been collectively bargained or the general terms of the Act to oust the terms of the collective agreement.

[26] However, the Federal Court of Appeal has decided that the terms of a collective agreement do not prevent the operation of vaccine policy in this context. In *Spears v. Canada (Attorney General), 2024 FC 329*, a case dealing with an almost identical factual context, the Federal Court of Appeal said:

> Here, the evidence confirmed that: the employer adopted a policy; Ms. Spears knew of this policy; Ms. Spears knew the consequences of non-compliance; and she chose not to comply. The policy remained valid notwithstanding that it was not part of the original written contract or collective agreement; our court has

> confirmed that misconduct is possible even if the violated policy is adopted after hiring…

[27] Regardless, of what I might think is worth further consideration in the Appellant's arguments, I am bound to follow the direction of the Federal Court of Appeal.

[28] Accordingly, I find that that the Commission has proven that there was misconduct. As was the case in *Spears*, the Appellant knew of the policy, and he knew the consequences of not being vaccinated.

[29] Based on my findings above, I find that the Claimant lost his job because of misconduct.

Conclusion

[30] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is disqualified from receiving EI benefits. This means the appeal is dismissed.

[31] The issues around the implementation of vaccine mandates during the COVID-19 pandemic are well known and still hotly contested. Much of the conversation around the issue has been uncivil and heated. I want to commend the Appellant for the careful, deliberate, and polite way he expressed his position on this appeal and his firm disagreement with the policy.

Benson Cowan
Member, General Division – Employment Insurance Section