



Citation: *MD v Canada Employment Insurance Commission*, 2025 SST 18

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant: M. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision dated December 12, 2022 (issued
by Service Canada)

Tribunal member: Nathalie Léger

Type of hearing: Videoconference

Hearing date: January 3, 2025

Hearing participant: Appellant

Decision date: January 3, 2025

File number: GE-24-4014

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 put on leave without pay and then dismissed 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 was put on leave without pay on November 20, 2021. The Appellant's employer says that he was put on leave because he refused to get vaccinated, which went against its vaccination policy. His employment was then terminated on December 31, 2021, because the Appellant still failed to follow the employer's policy.²

[4] Even though the Appellant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. He also says he should have been given two more weeks to comply. I will explain why later in this decision.

[5] The Commission accepted the employer's reason for the dismissal. It was decided that the Appellant was put on leave without pay and dismissed because of misconduct. Because of this, the Commission decided that the Appellant is disqualified from receiving EI benefits.

[6] I have to decide if what the Appellant has done can be qualified as misconduct under the Act.

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 GD3-33 and GD3-36.

Issue

[7] Did the Appellant lose his job because of misconduct?

Analysis

[8] 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.³

[9] To answer the question of whether the Appellant was put on leave without pay because of misconduct, I have to decide two things. First, I have to determine why the Appellant lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Appellant lose his job?

[10] I find that the Appellant was put on leave without pay and dismissed because he went against his employer's vaccination policy.

[11] Both parties agree that this is the case and I see nothing in the evidence that could lead me to believe otherwise.

Is the reason for the Appellant's leave without pay misconduct under the law?

[12] The reason for the Appellant's leave without pay is misconduct under the law.

[13] 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 leave without pay 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.

[14] 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

³ See sections 30 and 31 of the Act.

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

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

[15] 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

[16] The law doesn't say I have to consider how the employer behaved.⁸ Instead, I have to focus on what the Appellant did or failed to do and whether that amounts to misconduct under the Act.⁹

[17] 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.¹⁰ I can consider only one thing: whether what the Appellant did or failed to do is misconduct under the Act.

[18] The Commission has to prove that the Appellant was put on leave without pay 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 put on leave without pay because of misconduct.¹¹

[19] The Commission says that there was misconduct because:

- the employer had a vaccination policy;

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.

⁸ See section 30 of the Act. See also *Palozzi c. Canada (Attorney General)*, 2024 FCA 81.

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- the policy was communicated to all employees, including the Appellant, and reminders about its application were sent;
- the employer clearly notified the Appellant about its expectations about getting vaccinated;
- the employer sent letters and exchanged emails with the Appellant to communicate what it expected;
- the Appellant knew or should have known what would happen if he didn't follow the policy.

[20] The Appellant says that there was no misconduct because the policy is not valid because it violates his right to bodily integrity. Therefore, not respecting it cannot be considered misconduct.

The employer's policy

[21] The Appellant admits he was aware¹² of the policy¹³ and knew that eventually, he could be put on leave without pay and dismissed if he did not get vaccinated. But he explained at the hearing that his employer's policy had not been integrated into the collective agreement and therefore was not part of his employment contract.

[22] The Appellant argued that he should not be bound by a policy that had been adopted unilaterally by his employer and that he did not agree to. He says that his union filed a grievance but that it still has not been heard.

[23] The policy's objectives are clear. The main one is to protect the health and safety of employees and their employees. Vaccination is a key element in the protection of employees against COVID-19".¹⁴

¹² This was mentioned at the hearing and was said to the Commission's agents on several occasions. See GD3-38. The Appellant also asked for a religious exemption because of the policy. He was therefore aware of it.

¹³ GD3-36

¹⁴ GD3-36

[24] The vaccination and attestation requirements are also clearly stated in a reminder sent to all employees in October of 2021¹⁵. The first expectation is that all employees are fully vaccinated by the full implementation date. Recognizing that some employees had not yet been vaccinated, the employer extended the first deadline to November 20, 2021. The second expectation is that all employees will disclose their vaccination status to the employer by the specified dates.

[25] The consequences for non-compliance to both those requirements are clearly stated in the reminder.¹⁶ Those who had not given their attestation or had not been vaccinated before November 21, 2021, would be placed on unpaid leave. Those who decided to maintain their non-compliance would be terminated on December 31, 2024. Those consequences are clear and were communicated to all employees.

[26] At the hearing, the Appellant recognized that he was aware of the policy and of the consequences of non-respecting it and still chose not to get vaccinated.

Analysis

[27] Considering all of the above, I find that the Commission has proven that there was misconduct because:

- the employer had a vaccination policy that clearly explained the requirements in terms of vaccination and disclosure of vaccination status.
- the employer sent written communications (emails) to all employees to communicate what it expected and the consequences of not meeting the expectations.
- the Appellant knew the consequence of not following the employer's vaccination policy.
- the Appellant did not get vaccinated by the required deadline.

¹⁵ GD3-36.

¹⁶ GD3-36.

So, was the Appellant put on leave without pay and dismissed because of misconduct?

[28] Based on my findings above, I find that the Appellant was put on leave without pay because of misconduct.

[29] This is because the Appellant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated was likely to cause him to be put on leave without pay and dismissed.

Conclusion

[30] The Commission has proven that the Appellant was put on leave without pay and dismissed because of misconduct. Because of this, the Appellant is disqualified from receiving EI benefits.

[31] This means that the appeal is dismissed.

Nathalie Léger

Member, General Division – Employment Insurance Section