



Citation: *MT v Canada Employment Insurance Commission*, 2021 SST 506

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

Decision

Appellant: M. T.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (416840) dated February 26, 2021
(issued by Service Canada)

Tribunal member: Lilian Klein

Type of hearing: Teleconference

Hearing date: July 21, 2021

Hearing participants: Appellant

Decision date: August 4, 2021

File number: GE-21-987

Decision

[1] I am dismissing the Claimant's appeal. I find that he lost his job because of misconduct because his actions were conscious and deliberate and he should have known he would be dismissed for refusing his employer's direct order.

[2] This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job as an equipment operator. His employer says it fired him because he refused to stop wearing a face mask bearing a Confederate flag that others found racist.

[4] The Claimant does not dispute that this happened but says his mask cannot be the real reason for his dismissal because the flag is not racist. He says he wore the mask for two months without any negative comments.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. As a result, it disqualified him from receiving EI benefits.

[6] It is not my role to decide whether the Claimant's employer dismissed him unfairly or whether the flag on his mask is inherently racist. I only have the authority to consider whether his actions meet the test for misconduct under the *Employment Insurance Act*.²

[7] To be misconduct under this test, claimants' actions have to be conscious and deliberate and breach their duty to their employer. They must also know—or should have known—that they could be dismissed for their actions.

¹ S 30 of the *Employment Insurance Act* says claimants who lose their job because of misconduct are disqualified from receiving EI benefits.

² Canada (*Attorney General*) v *McNamara*, 2007 FCA 107.

The issue I must decide

[8] Did the Claimant lose his job because of misconduct?

Analysis

[9] To determine whether the Claimant lost his job because of misconduct, I have to decide two questions. First, I have to decide why he lost his job. Then, I have to decide whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[10] I find that the Claimant lost his job because, after a warning, he refused his employer's direct order to remove his face mask. The mask bore a Confederate flag and someone complained about it.

[11] The Claimant and the Commission do not agree on why he lost his job. The Commission says the reason the employer gave is the real reason.

[12] The employer told the Commission that the Claimant's supervisor had warned him not to wear his face mask. The next day he returned to work wearing the same mask. The employer says it called him into a meeting with senior personnel and asked him to remove his mask but he refused to do so. The employer then fired him.

[13] The Claimant says he wore his mask at work for two months without anyone complaining until his first conversation with his supervisor. He says he refused his employer's request because he felt bullied when asked to remove his mask.

[14] The Claimant submitted material to support his argument that the symbol on his mask is a harmless sign of legitimate rebellion. He says racist groups may have adopted the Confederate flag but that does not make it racist. He argues that it is a symbol of pride, not hate.³

[15] I see no other reason for the Claimant's dismissal in the evidence and he has not

³ See GD-7.

given one beyond suggesting there may have been “personal reasons.” I find this unlikely because he worked for this same employer on a seasonal basis since 2007. I find it unlikely that it would keep rehiring him and then look for chances to dismiss him.

[16] As a result, I find that his refusal to remove his mask was the real reason for his dismissal, and not an excuse to fire him.⁴

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

[17] The reason for the Claimant’s dismissal is considered misconduct under the law.

[18] To be misconduct, the conduct has to be wilful. This means that it is conscious, deliberate or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ The Claimant does not have to have wrongful intent (in other words, he does not have to intend to do something wrong) for his actions to be misconduct under the law.⁷

[19] There is also misconduct if the Claimant knew—or should have known—that his conduct would prevent him carrying out his duty to his employer and there was a real chance that he could be dismissed for that reason.⁸

[20] The Commission has to prove that the Claimant lost his job because of misconduct. It has to prove this on a balance of probabilities. This means that it has to show it is more likely than not that the Claimant lost his job because of misconduct.⁹

[21] The Commission says there was misconduct because the Claimant refused a direct order from his employer to remove his mask the day after he was warned not to wear it at work. The Commission contacted the employer to verify these events.

⁴ *Davlut v Canada (Attorney General)*, A-241-82.

⁵ *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ *Canada (Attorney General) v Secours*, A-352-94.

⁸ *Mishibinijima*, see above.

⁹ *Minister of Employment and Immigration v Bartone*, A-369-88.

[22] The Claimant says there was no misconduct because there is nothing wrong with the flag on his mask; he argues that material on the internet proves this point.

Were the Claimant's actions conscious and deliberate?

[23] Yes. Returning to work wearing his mask the day after he was warned to replace it was a conscious and deliberate choice. That is the first part of the test for misconduct under the law.

[24] Refusing a direct order from his employer the very next day to remove the mask was also conscious and deliberate. He admits that he could have kept his job if he had removed the mask so his refusal was reckless.

Did the Claimant breach his duty to his employer?

[25] Yes. By refusing a direct order, the Claimant breached his duty to his employer. This is the second part of the test for misconduct. The employer was acting in response to a workplace complaint and the Claimant had a duty to cooperate in the interests of ensuring a harmonious work environment for all.

[26] The Claimant does not agree that refusing to remove his mask violated his duty to his employer. He says there is nothing wrong with having the Confederate flag on his mask since others workers can wear symbols too, such as sports team logos.

[27] I give more weight to the Claimant's testimony that he refused to remove his mask because he did not consider it racist than to his argument that he could not remove it because his employer failed to offer him a replacement. The parties dispute this specific point, with no conclusive evidence either way. But the Claimant's testimony makes it more likely than not that he was acting on principle as he saw it.

[28] The issue in this second part of the test for misconduct is not whether an employer is justified in making a request or whether the employee agrees with it. The issue is that an employee must agree to an employer's reasonable request. I find that by refusing his employer's request, the Claimant breached his duty to his employer.

Should the Claimant have known that his actions would get him fired?

[29] Yes. Before finding that the Claimant should have known he would be fired, I considered that the Commission did not ask the employer for its Code of Conduct (Code). Contravening the Code is the reason for the Claimant's dismissal, as documented on the progressive discipline record.¹⁰ I see no company rules in the evidence either. The Claimant says he has never seen a Code or any workplace rules.

[30] I considered whether the Commission's oversight might mean that the Claimant could not have known he was breaking company policy or that he did not understand the consequences of refusing his employer's request. He says he wore the mask for two months before anyone noticed there was a problem.

[31] Even if it did not submit the Code, I find that the Commission showed—on a balance of probabilities—that the Claimant should have known he would be fired. The evidence it collected from the employer confirms that he was warned but still came to work the next day wearing the same mask. At the meeting with his superiors on his last day, he refused to remove it; this was insubordination.

[32] The Claimant says the employer did not warn him at the meeting before it told him to remove his mask that he would be fired if he refused. It only fired him after he refused to comply.

[33] I find that being called to such a meeting was a clear sign that the matter had escalated and that refusing his employer's request could have dire consequences. Given this escalation, I find that the Claimant should have known that refusing his employer's direct order was likely to get him fired.

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

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

¹⁰ See GD8-2.

Conclusion

[35] The Commission has proved that the Claimant lost his job because of misconduct. As a result, he is disqualified from receiving EI benefits.

[36] This means that I am dismissing the Claimant's appeal.

Lilian Klein

Member, General Division – Employment Insurance Section