



Citation: *LJ v Canada Employment Insurance Commission*, 2022 SST 150

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: L. J.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (438330) dated November 17, 2021 (issued by Service Canada)

Tribunal member: Sylvie Charron

Type of hearing: Teleconference

Hearing date: January 6, 2022

Hearing participant: Appellant

Decision date: January 20, 2022

File number: GE-21-2505

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 from his job because of misconduct (in other words, because he did something that caused him to lose his job). This means he is disqualified from receiving Employment Insurance (EI) benefits.

Overview

[3] The Appellant left his job on June 7, 2021 and applied for EI benefits. The Canada Employment Insurance Commission (Commission) looked at the Appellant's reasons for leaving. It decided that he was placed on a leave of absence from his job because of misconduct so it wasn't able to pay him benefits.

[4] The Appellant's employer says that he was placed on a leave of absence from his job because he refused to be vaccinated or tested weekly for COVID-19 in accordance with the employer's vaccination policy. This leave of absence is for an indefinite period until the Appellant agrees to the conditions of employment.

[5] The Appellant does not dispute that this happened. He says that he is in good health and does not see the need for vaccination or testing. He testified that he does not want to be a guinea pig and be tested every week. He does not take any medication and lives a clean life. In his view, the use of Personal Protective Equipment such as masks and shields should be sufficient to prevent the spread of COVID-19 in his case. He also confirmed that although he really enjoyed his job, he is unlikely to go back unless the vaccination policy changes.

[6] The Commission accepted the employer's reason for dismissal. It ultimately decided that the Appellant lost his job because of misconduct. For that reason, the Commission decided that the Appellant is disqualified from receiving EI benefits.

Issue

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

[8] To answer this, I must decide two things. First, I must determine why the Appellant was suspended from his job. Then I have to determine whether the law considers that reason to be misconduct.

Analysis

Why was the Appellant suspended from his job?

[9] I find that the Appellant lost his job because he refused to be vaccinated or tested weekly using a PCR (Polymerase Chain Reaction) test. The Appellant agrees that he was suspended without pay on June 7, 2021 for that reason. I see no evidence to contradict this.

[10] The employer explained to the Commission that the Appellant was placed on a leave of absence because he chose not to be vaccinated. The Appellant was put on a leave of absence without pay for an indefinite period. The period would come to an end should the Appellant accept the employer's vaccination policy and agree to be vaccinated.¹

[11] The employer also explained that on May 12, 2021, the Appellant was advised in writing that he had to either be vaccinated or be tested for Covid-19 on a weekly basis. The Appellant chose not to be vaccinated and stopped his weekly tests on June 7, 2021.

[12] The Appellant was notified by the Commission that because he had been put on leave voluntarily without just cause, he was denied EI benefits.² The Appellant requested a reconsideration of this decision.

[13] Upon reconsideration, the Commission maintained its decision.³ However, in its submissions to the Tribunal, the Commission explained that the wrong reason had been

¹ See pages GD3-24 and 25

² See page GD3-28

³ See page GD3-36

given to the Appellant for denying him EI benefits. The Commission now says that the Appellant was suspended from his job as a result of his own misconduct.⁴

[14] The Commission submitted to the Tribunal that in looking at the Appellant's circumstances, it should have determined that the Appellant lost his job because of his own misconduct as the employer was suspending him for not complying with the vaccination policy.

[15] The question of whether the Appellant stopped working due to voluntarily leaving his job or because of his own misconduct is important because the legal tests I must apply to decide the two issues are different. As well, the onus of proving the reason for leaving is different for both issues.

[16] I accept that the change in reason is not fatal to the decision under appeal, as the Federal Court of Appeal explained.⁵

[17] The *Employment Insurance Act* (the Act) deals with misconduct and voluntarily leaving without just cause together. The Act states that the loss of employment must be involuntary to qualify for EI benefits.⁶ This means that an Appellant is disqualified from receiving EI benefits if he loses his job due to misconduct, or if he voluntarily leaves without just cause.

[18] Because of this, in the present case, I can decide if the Appellant lost his job because of misconduct if the evidence supports this finding. This means that the Commission has to show that the Appellant's conduct was willful, meaning that it was conscious, deliberate, or intentional.⁷

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

[19] I find that the reason for the Appellant's suspension is misconduct under the law, for the reasons that follow.

⁴ See page GD4-3

⁵ *Desrosiers v. Canada (AG)*, A-128-89

⁶ *Hills v. Canada (Attorney General)*, 1988, 1 S.C.R. 513

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

[20] As stated above, to be misconduct under the law, the conduct has to be wilful. This means that it was conscious, deliberate, or intentional. It also includes conduct that is so reckless that it is almost wilful.⁸ The Appellant doesn't have to have wrongful intent (in other words, the Appellant doesn't have to mean to be doing something wrong) for his behaviour to be misconduct under the law.⁹

[21] 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.¹⁰

[22] The Commission says that there was misconduct because the Appellant knew that he had to either be vaccinated or tested weekly to continue working with the employer.¹¹ He refused intentionally; this refusal was wilful. This was the direct cause of his suspension.

[23] The Appellant says that he was suspended through no fault of his own. I find that the Appellant had a reasonable alternative to the vaccination; he could have agreed to be tested weekly. Complying with the employer's vaccination policy would have avoided the unemployment situation. The Appellant knew that his refusal to comply with the policy could lead to suspension and an eventual dismissal. This is wilful, conscious and deliberate and meets the legal notion of misconduct as outlined in subsection 30(1) of the Act.

[24] I find that the Commission has proven that the Appellant lost his job because of misconduct. He had been informed of the employer's vaccination policy and was given time to comply. The employer could not offer alternatives such as other work as the policy applied to all employees.

⁸ *McKay-Eden v. Her Majesty the Queen*, A-402-96

⁹ *Attorney General of Canada v. Secours*, A-352-94

¹⁰ See above, footnote 7

¹¹ GD3-34

[25] While I sympathize with the Appellant who is now without a job, I must apply the law as it stands. Based on my findings outlined above, I find that the Appellant has lost his job because of his own misconduct.

Conclusion

[26] I find that the Appellant is disqualified from receiving benefits.

[27] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section