



Citation: *SS v Canada Employment Insurance Commission*, 2022 SST 282

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: S. S.
Representative: Fayme Hodal

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (439094) dated December 3, 2021 (issued by Service Canada)

Tribunal member: Sylvie Charron

Type of hearing: Teleconference
Hearing date: February 15, 2022
Hearing participant: Appellant's representative

Decision date: March 9, 2022
File number: GE-22-52

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Appellant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Appellant lost his job 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 said that he was let go because he refused to get vaccinated in compliance with the employer's vaccination policy.

[4] Even though the Appellant doesn't dispute that this happened, he says that the employer let him go without cause. The Appellant says that the employer actually let him go without even trying to accommodate him or give him alternate arrangements.

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

Matters I have to consider first

The Appellant wasn't at the hearing

[6] The Appellant wasn't at the hearing. A hearing can go ahead without the Appellant if the Appellant got the notice of hearing.²

[7] In this case, even though the Appellant did not appear, his lawyer appeared and presented his case for him. She confirmed that the Appellant chose not to appear and

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

² Section 12 of the *Social Security Tribunal Regulations* sets out this rule.

that she would deal with the matter in his place. I accepted her explanation and the hearing went ahead as scheduled.

I will accept the documents sent in after the hearing

[7] At the hearing, it was agreed that the Representative would send in a written version of her oral submissions. The document was received as agreed to and coded as GD9.

Issue

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

Analysis

[9] To answer the question of whether the Appellant lost his job 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 lost his job because of his refusal to get vaccinated and submit proof of vaccination by the deadlines included in his employer's vaccination policy.

[11] The Appellant does not dispute this.

[12] At the hearing, the Representative agreed that there is no dispute on the facts.³

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

[13] The reason for the Appellant's dismissal is misconduct under the law. My finding is explained in the reasons below.

³ See GD9-2, first paragraph.

[14] To be misconduct under the law, 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

[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 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.⁸

[17] The Commission says that there was misconduct because the Appellant deliberately refused to be vaccinated when the employer put in place a vaccination policy to protect its employees and the vulnerable patients they serve. This is the direct cause of the Appellant's dismissal.

[18] The Commission further says that refusal to comply with the employer's legitimate and reasonable policy to get a vaccine in a time of a global pandemic constitutes misconduct under the *Act*. Most provinces as well as federal authorities had suggested, and later imposed, vaccine mandates in order to protect populations, the health care system and the economy in general.

[19] The Commission concludes that the Appellant's failure to comply results in his employment no longer being compatible with the objectives of his employment relationship. The Appellant was aware of the consequences that his choice entailed.

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.

⁸ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[20] The Appellant says that there was no misconduct and he was terminated without cause.

[21] The Appellant says that he was already being accommodated because of physical restrictions flowing from a prior accident; he says that the employer did not always adhere to what was agreed to in respect of these accommodations. It would not have been difficult to accommodate him still and allow him to work from home.

[22] The Appellant also says that there were no official public health orders or governmental mandates to force the employer to adopt a vaccination policy; there was no legal obligation to impose vaccination on the employees. This makes the unilateral imposition of the policy unreasonable.

[23] As well, the Appellant submits that the employer had no other vaccination requirements such as for typhoid, polio, rubella, etc. in the employment agreement.

[24] Finally, the Appellant states that he is simply not comfortable with getting the vaccine. The only reason there is a finding of "misconduct" is because of the employer-imposed situation.

[25] In the end, the Representative submits that to accept a finding of misconduct for every employee who is dismissed through no fault of their own when the employer unilaterally changes the employment situation is not reasonable. The employment insurance scheme should be there to bridge the gap between old and new employment in these cases.

[26] I find that the Commission has proven that there was misconduct. My reasons follow.

[27] The employer imposed a vaccination policy on all employees equally. The employees were given notice. They were made aware of the consequences of not complying. While it is true that at the time, there were no legal mandates to do so, it is open to any employer to develop reasonable policies at any time when health and safety issues are involved.

[28] I find that with a global pandemic going on, and effective vaccines being available, it was not unreasonable for this particular employer to impose a vaccination policy. It is all the more reasonable given that the clients in this case are part of a vulnerable population that might be susceptible to more dire consequences should they be exposed to Covid-19.

[29] The fact that the employer did not have inoculation policies for other communicable diseases is not relevant. There are no ongoing pandemics for polio, typhus or rubella in this country.

[30] I find that the employer gave notice to the employees of the upcoming deadlines for vaccination. He informed the Appellant ahead of everyone else, so the Appellant had more prior notice than the rest of the staff. The Appellant informed his employer that he did not want to be vaccinated, although he had been told that he would face termination.⁹

[31] The Commission submits that the situation fits the definition of misconduct under the *Act*. I agree. The Appellant refused to comply with a legitimate and reasonable set of instructions put in place to protect employees and clients. The Appellant knew that this would result in termination. The refusal to be vaccinated is the direct cause of termination.

[32] The Appellant's conduct was wilful, in the sense that the acts that led to the dismissal were conscious, deliberate and intentional.

[33] To address the Representative's final submission, it is true that employment insurance is meant to tide over employees when there is a gap in the employment situation. However, the basic principle of EI is that one must not place herself or himself in a situation of unemployment deliberately. This is what happened here.

⁹ See GD3-18, 19.

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

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

Conclusion

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

[36] This means that the appeal is dismissed.

Sylvie Charron

Member, General Division – Employment Insurance Section