



Citation: *DN v Canada Employment Insurance Commission*, 2022 SST 355

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

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (442432) dated December 8,
2021 (issued by Service Canada)

Tribunal member: Paul Dusome
Type of hearing: Teleconference
Hearing date: March 31, 2022
Hearing participant: Appellant
Decision date: April 1, 2022
File number: GE-22-511

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't proven that the Claimant lost his job because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant isn't disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he refused to comply with a COVID-19 policy, and for improper behaviour. That policy (Policy) was created by another corporation to which the employer served as a subcontractor. The employer did not have its own COVID-19 policy.

[4] Even though the Claimant doesn't dispute that he was dismissed, he was not told why when it happened. He had a discussion with the employer and the other corporation about the Policy before it came into effect. He suggested some changes. The other corporation did not want to make the changes. The Claimant did not want to comply with testing when only unvaccinated employees would be tested. That did not protect his health. He was dismissed before the Policy came into effect.

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

Issue

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

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

Analysis

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

Why did the Claimant lose his job?

[8] I find that the Claimant lost his job because he stated an intention not to comply with the Policy before the start date for the Policy to take effect.

[9] I find the following facts. The Claimant was a union member employee of the employer in the construction field. He had worked for the employer for a number of years. At the time of the dismissal, the employer was a subcontractor on a project for another corporation, X. X had a COVID-19 policy (the Policy). The employer did not have its own COVID-19 policy. X required that the employer's employees comply with the Policy if they worked on the project. If they did not comply, the employee would not be allowed on the work site.

[10] The Policy had the following requirements. Mandatory rapid testing was to start on September 27, 2021. Only those who were not vaccinated against COVID had to be tested prior to entering the work site, and await a negative test result before entering. The test was to be done two times a week. Beginning in November 2021, the Policy required that all persons entering the work site had to be fully vaccinated.

[11] A copy of the Policy is not in evidence. The Claimant was never given a copy. The employer did not provide a copy to the Commission because the Policy was X's, not the employer's. The employer said it would ask for permission to give a copy to the Commission. The Commission did not receive a copy.

[12] The Claimant found out about the Policy from a co-worker on September 22, 2021. He asked the employer for a copy, but never received one. He had a concern with the Policy not requiring that vaccinated workers be tested. The vaccinated could

spread COVID too. That posed a health risk to him. It also posed a financial risk that he would lose income if required to isolate. The next day, September 23rd, the Claimant asked his foreman to speak to the health and safety committee for the site to clarify the Policy and express his concern. The foreman took him to speak to a X HR representative at the site. The representative reviewed the Policy with the Claimant, and showed him parts of it on her computer screen. He asked what could be done to protect his safety against COVID. The representative suggested wiping surfaces and using a wash cart before entering site trailers. The Claimant asked if all persons entering the work site, whether vaccinated or not, could be tested for COVID to protect persons who were unvaccinated or partially vaccinated. He suggested using temperature scanning devices to avoid the cost of test kits. The representative said that the Policy was set. The Claimant said he did not want to comply with the Policy because it did not protect him, and others. The representative said that if the Claimant did not comply, he would probably be dismissed. It was shortly after this meeting that the employer dismissed the Claimant on September 23rd.

[13] After the meeting with the representative ended, the Claimant was taken to a trailer on the site, and told by his foreman to wait. About 40 minutes later, the foreman returned. He told the Claimant to go home and not return, with no reasons given. After that, the Claimant spoke to the branch manager and asked for a transfer, or a lay-off. But neither was given.

[14] Two legal principles are relevant at this point to assessing the evidence put forward by the Commission to support a finding of misconduct. A finding of misconduct can only be made on clear evidence, not on speculation or supposition, and not on the basis of the employer's opinion.² Misconduct cannot be found where the evidence is either lacking, deficient or confusing.³

[15] I have the following concerns about the Commission's evidence obtained from the employer. The foreman said twice that the Claimant was getting tested. The

² *Crichlow v Canada (Attorney General)*, A-562-97.

³ *Canada (Attorney General) v Granstrom*, 2003 FCA 485.

branch manager said the Claimant was not partaking in the testing at the time of his dismissal. That inconsistency does not help the Commission's case. The foreman's statement that the Claimant was getting tested casts doubt on the claim that the Claimant refused to be tested under the Policy. The foreman said the Claimant was acting in an erratic fashion in expressing his disagreement with the Policy. When the Policy was being explained to the Claimant, he recorded the person explaining the Policy. The employer felt threatened. The Claimant was very vocal in his disagreement with the testing requirement, but did not get into a heated argument, was not given any warnings about his behaviour, and the authorities were not called. The Claimant's behaviour led to his dismissal. According to the branch manager of the employer, the Claimant was dismissed for two reasons. First, X would no longer permit the Claimant on the job site because the Claimant recorded its HR person explaining the policy, and his overall behaviour, including his refusal to be tested. Second, the Claimant was refusing to follow the X Policy, so the employer had to dismiss him. The employer's branch manager said he had no choice but to dismiss the Claimant once X would not allow the Claimant on the job site. The reason for X's decision was the Claimant's refusal of testing, without a mention of his behaviour. The evidence of the Claimant's alleged behaviour is thin. "Acting in an erratic fashion" is more conclusion than description. It does not fit well with the later statement that the Claimant did not get into a heated argument, was not given warnings and the authorities were not called. That last statement undercuts the conclusion that the Claimant's behaviour led to his dismissal. There is no evidence from X about this alleged behaviour.

[16] In those statements there is confusion about whether the Claimant was testing or not. There is confusion about who allegedly felt threatened by the Claimant in the meeting to discuss the Policy. Was it the employer as the foreman said, or the HR person as the branch manager said? There is a lack of detail about the Claimant's alleged behaviour that led to his dismissal. He was very vocal, but there was no heated argument. If the Claimant was behaving badly, one would expect the foreman, who was present at the meeting with X's representative, to have intervened and warned the Claimant to stop. But no warning was issued, according to the foreman's statement. This alleged behaviour disappears as a reason for the dismissal in the last statement

from the branch manager. The branch manager said he had no choice but to dismiss the Claimant once X refused to allow the Claimant on its job site. There are no statements from X to support that claim that it would not allow the Claimant on its job site, or that it required the Claimant to be dismissed. There are two concerns here. First, when X allegedly made that decision, the Policy had not come into effect. There is a concern about the legitimacy of such a decision made when the Policy was not in effect. How could X bar the Claimant from its job site when it had not actually seen the Claimant attend when the Policy was in force, and at that time, refuse to be tested? It simply assumed that he would refuse, without verifying the truth of that assumption. Second, how does the decision of X force the employer to dismiss the Claimant? The branch manager said he had no choice. There has been no evidence to support that statement. Based on this review of the evidence from the employer, the evidence of misconduct is lacking, deficient and confusing. There is a great deal of speculation or supposition about what the Claimant would in fact do when the Policy came into force. There was an undue reliance on the employer's (and perhaps X's) opinion that the statement of refusal to comply made by the Claimant before the Policy was in effect would in fact be repeated when the Policy came into effect on September 27, 2021.

[17] I conclude from the above review of the evidence that the Claimant was dismissed from his job because he said before the COVID Policy came into effect that he would not comply with the testing requirement unless vaccinated employees were also included in the testing. I find that the allegations of improper behaviour by the Claimant have not been proven from the slim evidence reviewed above.

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

[18] The reason for the Claimant's dismissal isn't misconduct under the law.

[19] 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 Claimant doesn't have to have

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

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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

[20] 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 because of that.⁷

[21] 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.⁸

[22] The Commission says that there was misconduct because the Claimant refused to comply with the Policy's requirement that he be tested before entering the work site.

[23] The Claimant says that there was no misconduct because he was trying to work out a resolution of the testing issue. He said on September 23, 2021, that he would not comply. The Policy did not come into effect until September 27, 2021.

[24] I find that the Commission hasn't proven that there was misconduct, because the evidence to support misconduct is wholly deficient. It rests on speculation that the Claimant would actually refuse to comply with the testing requirement in the future, and at a time when the Policy was in effect, which would occur after the dismissal decision had been made.

[25] The first criterion is whether the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer. On September 23, 2021, there was no Policy in effect. On that date, the Claimant's refusal to be tested had no effect. He was not required to be tested on that date. On that date, his refusal did not get in the way of carrying out his duties to his employer. It was only on September 27, 2021, that his refusal would have gotten in the way of carrying out his

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.

duties toward his employer, but then only in respect of the X project. Had he refused on that date (while still an employee of the employer) he could not have carried out his duties to the employer with respect to X. He would have been barred from the job site on that date. The Commission has provided no evidence that the Claimant being barred from the X job site would prevent him from carrying out other duties toward his employer. The branch manager's claim that he had to dismiss the Claimant from the employer's employment is not supported by the employer's evidence that refusal to comply with the Policy would only prevent the Claimant from working on X's job site. There is no evidence that X or the Policy required the dismissal of the Claimant. On the evidence, it is simply the opinion of the branch manager that he had to dismiss the Claimant.

[26] With respect to whether the conduct was wilful, conscious, deliberate and intentional, on September 23, 2021, there is no doubt that his decision to decline testing met this requirement. On September 27, 2021, we do not know because the Claimant had already been dismissed. The Claimant did not have the opportunity on September 27, 2021, to refuse or to comply.

[27] With respect to the criterion of the Claimant being aware of the possibility of being dismissed, there is no doubt that he was aware that if he refused testing on September 27, 2021, when the Policy came into effect, he would probably be dismissed. X's representative had told him that. The evidence does not establish that he was aware of this possibility on September 23, 2021, when the dismissal did occur.

[28] The Commission has not proven that the Claimant's refusal to be tested caused the dismissal. The Policy did not come into effect until the fourth day after the dismissal. The Claimant expressed his concern about the testing not applying to fully vaccinated persons. He also expressed concern about losing his job and income. At best, the Claimant expressed an intention not to comply in the future. He did not refuse to comply when the Policy was in effect. Had the Claimant not been dismissed on September 23rd, had attended work on September 27th, and had then refused to be tested, that would be strong evidence that the dismissal was caused by his refusal to

comply with the Policy. His dismissal prior to the effective date of the Policy is not good evidence. The Claimant's expression of his intention on September 23rd was not put to the acid test on September 27th. The Claimant had conflicting concerns: fear for his safety from vaccinated persons not being tested; and fear of loss of his income. These considerations apply to X as well. It too acted on a statement of future intention, without confirming that the Claimant would actually act on that intention. In the absence of the evidence of what the Claimant would actually do on September 27th, the Commission has not proven that the Claimant's refusal on September 23, 2021, was misconduct that caused the dismissal. The Commission has not met its onus of proving that there was a breach of the Policy that caused the dismissal. No breach of the Policy had occurred on the date of dismissal.

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

[30] Based on my findings above, I find that the Claimant didn't lose his job because of misconduct. The employer proceeded on the assumption that misconduct was going to happen, without waiting to see if it actually happened.

Conclusion

[31] The Commission hasn't proven that the Claimant lost his job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[32] This means that the appeal is allowed.

Paul Dusome
Member, General Division – Employment Insurance Section