



Citation: *AY v Canada Employment Insurance Commission*, 2022 SST 709

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

## Decision

**Appellant:** A. Y.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (449169) dated January 24, 2022 (issued by Service Canada)

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**Tribunal member:** Leanne Bourassa

**Type of hearing:** Videoconference

**Hearing date:** March 24, 2022

**Hearing participants:** Appellant

**Decision date:** April 25, 2022

**File number:** GE-22-557

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant, A. Y., 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 is disqualified from receiving Employment Insurance (EI) benefits.<sup>1</sup>

## Overview

[3] On October 14, 2021, the British Columbia (BC) Provincial Health Officer issued an order that all persons employed by a regional health board had to be vaccinated against COVID-19 by October 26, 2021. The Claimant refused to get a vaccine against COVID-19. He was put on an unpaid leave of absence. He was told he needed to have a first dose of a vaccine by November 15, 2021 in order to continue his employment. The Claimant still refused. On November 15, 2021, the Claimant's employment was terminated.

[4] 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.

[5] The Claimant doesn't dispute that this happened. He argues that the employer's actions in dismissing him violated his contract and was wrong and illegal. He says he did not lose his employment because of misconduct, but because of a vaccine mandate requiring him to take dangerous experimental drugs as a condition of his employment. This is against his collective agreement.

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

## **Matter I have to consider first**

### **The Employer is not a party to the appeal**

[6] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer such a letter. The employer did not reply to the letter.

[7] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, as there is nothing in my file that suggests that my decision would impose any legal obligations on the employer.

### **My jurisdiction**

[8] I recognize that originally, the Claimant was on an unpaid leave of absence (or suspension) from his employment and applied immediately for benefits. There is a specific section of the Employment Insurance Act that deals with disentitlements for that reason.<sup>2</sup>

[9] However, by the time the Commission issued a decision about his benefits, the Claimant had been dismissed, and the Commission's decision's reflected that change in status. This is maintained in the decision that the Commission made on reconsideration.

[10] My jurisdiction is based on the reconsideration decision. In that decision, the Commission says that they cannot pay any EI regular benefits starting October 24, 2021, because the Claimant lost his employment on October 25, 2021, as a result of misconduct.

[11] So, even though the Claimant was originally on a leave of absence, since the Commission has only made an initial decision and reconsidered its decision to not pay the Claimant EI benefits because he was dismissed from his job due to misconduct, I will only be issuing a decision on the issue of a disqualification because of dismissal<sup>3</sup>, where the last day of work was October 24, 2021.

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<sup>2</sup> This is section 31 of the Employment Insurance Act.

<sup>3</sup> This is addressed in section 30 of the Employment Insurance Act.

## **Issue**

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

## **Analysis**

[13] 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?**

[14] I find that the Claimant lost his job because he refused to comply with the Provincial Health Officer's order requiring provincial health services employees to be vaccinated against COVID-19.

[15] The Claimant testified that he was originally put on an unpaid leave of absence on October 25, 2021. This was because he had refused to get what he believed was a dangerous, experimental drug. He said the requirements were clear, that employees should get the shot or be put on a leave of absence, possibly leading to termination. He understood that from the general email messages that went out and direct talks with his supervisor and manager.

[16] He says that the supervisor and manager initiated conversations with him because they noted that their records showed he didn't get the shot. They wanted him to know what the policy would be going forward. That was that he would be put on a leave of absence on October 26, 2021. Then, as they got more information and the policy developed, there would be termination on November 15, 2021.

[17] The Claimant confirmed that he had had meetings with his supervisor and manager who discussed the policy with him. There was also a termination meeting where the termination letter was read to him. At that point there was nothing he could say that would change their minds.

[18] The Termination Letter dated November 15, 2021, says that the Claimant's status is being changed from Unpaid Leave to Termination. The letter explains that the Claimant had been advised by letter on October 25, 2021 that he had to be vaccinated against COVID-19 in order to work for the provincial health services authority after October 26, 2021. As of November 15, 2021, the employer was not able to confirm that he had received his dose 1 vaccination against COVID-19. Because of that, his status was changed from "unpaid leave" to "terminated" effective November 15, 2021.

[19] The Claimant does not dispute that his employer put him on unpaid leave and then dismissed him because he did not get the COVID-19 vaccine as required by the provincial policy. I see no evidence to contradict this, so I find that the Claimant lost his employment because he did not comply with the provincial health order that employees of health services had to be vaccinated against COVID-19.

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

[20] The reason for the Claimant's dismissal is misconduct under the law.

[21] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>4</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>5</sup> The Claimant 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.<sup>6</sup>

[22] 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.<sup>7</sup>

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<sup>4</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

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

<sup>6</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>7</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[23] 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.<sup>8</sup>

[24] The Commission says that there was misconduct because the Claimant knew and understood that he was on administrative leave without pay because he failed to comply with the vaccine mandate without an approved medical or religious reason. He still chose not to comply with the provincial order to get vaccinated.

[25] The Claimant says that there was no misconduct because he lost his employment not for any negative aspect, but because of the vaccine mandate. He argues he was wrongly and illegally dismissed and his labour relations officer is grieving the decision.

[26] The Claimant testified that he knew that the provincial health order was in effect and that it applied to him. He said he considered applying for a religious accommodation, but that when he saw that they were all being rejected, he didn't bother seeking one.

[27] The Claimant provided a copy of a letter from a lawyer that was sent to the union president arguing against the provincial order. He explained that this was prepared and sent before the order of the Provincial health officer was issued and before he was put on unpaid leave. While he agrees with this letter, he says this was not sent to his employer, just the union. Although the document provides arguments against the provincial order, since it was not sent to the Claimant's employer, nor does it discuss the Claimant's particular situation, I do not see it as relevant or informative in deciding if the Claimant's dismissal was due to his own actions.

[28] The Claimant does confirm that there had been emails that had gone out to everyone about the policy. As it got closer to October 26, 2021, the messages got more specific. The requirements were clear that all health care workers had to get the shot or they would be put on a leave of absence and possibly lead to termination. He was aware of that possibility. His supervisor and manager had talked to him about it.

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

[29] The Claimant also confirmed that even though he knew of the possibility of being put on a leave of absence, he decided not to get vaccinated. He felt his employer couldn't force him to take an experimental drug and that this was not in his collective agreement.

[30] The Claimant argues that the requirement to be vaccinated is against his collective agreement. Compliance with a collective agreement must be arbitrated under the terms of that agreement and is not relevant to the Claimant's eligibility in this case. I see that the Claimant has filed a grievance against his employer.

[31] However, I do note that in the collective agreement the Claimant sent the Tribunal to support his case, there is a clause that specifically says that an employee may be required by the employer to take vaccinations unless the employee's physician has advised in writing that such a procedure may have an adverse effect on the employee's health.<sup>9</sup> In this case, I don't see any written notice from the Claimant's physician. The Claimant testified that he did not have grounds for a medical exemption.

[32] The Claimant testified that the employer went straight to firing without giving him any options. He says they could have let him work online from home or required him to do training or education to keep working. His view is that the employer should have offered other options to being put on leave.

[33] In cases for a disqualification from receiving EI benefits due to misconduct, the focus of the analysis is on the claimant's acts or omissions. If the Claimant was aware of the rules and the consequences for not complying, the employer's conduct is not a relevant consideration.<sup>10</sup>

[34] The Claimant argues that he had a right to refuse the shot. That is true. However, that does not exempt him from the consequences of that refusal. In this case, the Claimant knew that there was a provincial order in place, knew that that order applied to him, knew

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<sup>9</sup> This is in article 6.01 (a) (ii) of the Provincial Agreement between the Health Science Professionals Bargaining Association and the Health Employers Association of BC. In this file, it is in the Claimant's submissions at GD2-31.

<sup>10</sup> See for example the case of *Paradis v. Canada (Attorney General)*, 2016 FC 1282

that there was a possibility of being placed on leave and ultimately losing his job if he did not comply. Knowing all this, he still chose to refuse the vaccine.

[35] In refusing to be vaccinated, under the provincial health order, the Claimant was required to be placed on an unpaid leave of absence. Because he was on an unpaid leave of absence, he could not fulfil his obligations to his employer. This meets the criteria of misconduct for the purposes of the Employment Insurance Act.

[36] I find that the Commission has proven that there was misconduct. The Claimant was dismissed because he failed to comply with a provincial health order that he was subject to. He did not get vaccinated against COVID-19. He knew of the order and knew the consequences of not complying, but he chose to refuse the vaccine anyway. This was a deliberate decision. As a result, I find that the Claimant lost his job because of his misconduct and is disqualified from receiving EI benefits.

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

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

### **Conclusion**

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

[39] This means that the appeal is dismissed.

Leanne Bourassa  
Member, General Division – Employment Insurance Section