



Citation: *AH v Canada Employment Insurance Commission*, 2022 SST 1236

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

Decision

Appellant (Claimant): A. H.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (464274) dated April 26, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference
Hearing date: September 21, 2022
Hearing participant: Appellant
Decision date: September 30, 2022
File number: GE-22-1781

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and then lost his job because of misconduct (in other words, because he did something that caused him to be suspended and lose his job). This means the Claimant is disentitled from receiving Employment Insurance (EI) benefits from December 27, 2021, to December 31, 2021, and disqualified from receiving benefits from January 2, 2022.¹

Overview

[3] The Claimant was initially placed on an unpaid leave of absence effective November 21, 2021. The Claimant was then dismissed from his job on December 31, 2021. The Claimant's employer (X) said the Claimant was placed an unpaid leave of absence and then dismissed because he failed to comply with their Covid-19 vaccination policy.

[4] The Commission accepted the employer's reason for the Claimant being placed on a leave of absence and then dismissed. The Commission considered the Claimant's unpaid leave of absence to be equivalent to a suspension, because the leave without pay was for failing to comply with the employer's mandatory vaccination policy.

[5] The Commission decided the Claimant was suspended and then lost his job because of misconduct. Because of this, the Commission decided the Claimant was

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

Section 30 of the *Employment Insurance Act* says that a claimant who is suspended from his employment because of his misconduct is not entitled to receive EI benefits until the claimant meets one of the following provisions: (a) that the period of suspension expires; (b) that the claimant loses or voluntarily leaves the employment; or (c) that the claimant, after the beginning of the suspension, accumulates with another employer the number of hours required by Section 7 to qualify to receive benefits.

disentitled from receiving EI benefits from December 27, 2021, to December 31, 2021, and disqualified from receiving benefits from January 2, 2022.

[6] The Commission says the Claimant made the willful and deliberation decision not to comply with the employer's vaccination policy.

[7] The Claimant says the employer acted illegally in denying his request for a religious exemption from the vaccine. He further says the employer violated his rights with their vaccination policy.

Matter I have to consider first

I will accept the documents sent in after the hearing

[8] The Claimant sent additional documents in post-hearing. The Commission also provided supplementary representations post-hearing. I have accepted these documents for the Appeal Record. The Claimant's post hearing documents were listed as GD8-1 to GD8-5. The Commission's post-hearing representations were listed in GD9.

Issue

[9] Was the Claimant suspended and dismissed because of misconduct?

Analysis

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

Why was the Claimant suspended and dismissed from his job?

[11] I find the Claimant was suspended and lost his job because he didn't comply with the employer's vaccination policy.

[12] The Commission says the reason the employer gave is the reason for the Claimant's suspension and dismissal. The employer told the Commission that the Claimant was suspended and dismissed for not complying with their Covid-19 vaccination policy.

[13] The Claimant doesn't dispute that he was dismissed for not complying with the employer's vaccination policy. However, the Claimant says the employer acted illegally in denying his request for a religious exemption.

[14] I find the Claimant was suspended and then dismissed for failing to comply with the employer's vaccination policy.

Was the reason for the Claimant's suspension and dismissal misconduct under the law?

[15] The reason for the Claimant's suspension and dismissal is misconduct under the law.

[16] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ 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.⁴

[17] 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 suspended and let go because of that.⁵

[18] The Commission has to prove that the Claimant was suspended and lost his job because of misconduct. The Commission has to prove this on a balance of probabilities.

² See *Mishibinjima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

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

This means that it has to show that it is more likely than not that the Claimant was dismissed and lost his job because of misconduct.⁶

[19] The Commission says there was misconduct because the Claimant made the willful and deliberation decision not to comply with the employer's policy.

[20] The Claimant says there was no misconduct because he was entitled to a religious exemption from the vaccine. The Claimant further says the employer violated his rights with their vaccination policy.

[21] I find the Commission has proven there was misconduct, because they showed the Claimant was fully aware of the employer's vaccination policy in September 2021 and the requirement to be fully vaccinated by November 20, 2021 (GD3-214). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees must be fully vaccinated as a condition of employment by November 20, 2021 (GD3-471 to GD3-475). I realize the Claimant argued that the employer violated his rights with their vaccination policy. However, the matter of whether the employer's policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.⁷

Additional Testimony from the Claimant

[22] I recognize the Claimant further testified that the employer acted illegally by denying his request for a religious exemption. I realize the Claimant was frustrated and displeased with the employer. However, as mentioned the matter of whether the employer's policy was unfair or unreasonable wasn't within my jurisdiction. The only issue before me was whether the Claimant was suspended and dismissed because of misconduct. On this matter, I must apply the EI Act. In other words, I cannot ignore the law even for compassionate reasons.⁸

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁷ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

⁸ *Knee v Canada (Attorney General)*, 2011 FCA 301.

So, was the Claimant suspended and dismissed because of misconduct?

[23] Based on my findings above, I find the Claimant was suspended and lost his job because of misconduct.

Conclusion

[24] The Commission has proven the Claimant was dismissed and lost his job because of misconduct. Because of this, the Claimant was disentitled from receiving EI benefits from December 27, 2021, to December 31, 2021, and disqualified from receiving benefits from January 2, 2022.

[25] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section