



Citation: *DM v Canada Employment Insurance Commission*, 2022 SST 1141

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Claimant: D. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (516737) dated August 11, 2022 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Teleconference

Hearing date: October 6, 2022

Hearing participant: Claimant

Decision date: October 19, 2022

File number: GE-22-2736

Decision

[1] The appeal is dismissed. I disagree with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has 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 is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job. The Claimant's employer said he was let go because he refused to comply with their mandatory COVID-19 vaccination policy.

[4] The Claimant agrees that he lost his job for this reason. However, he says that his employer refused to consider his request for more information about the COVID-19 vaccine and treated him unfairly.

[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?

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.

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

Why did the Claimant lose his job?

[8] I find that the Claimant lost his job because he refused to comply with his employer's mandatory COVID-19 vaccination policy.

[9] The Claimant and the Commission agree on why the Claimant lost his job. The Claimant agrees that he lost his job because he refused to comply with his employer's mandatory COVID-19 vaccination policy. His employer also says that he lost his job for this reason.²

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

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

[11] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ 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.⁵

[12] 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.⁶

[13] 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.⁷

² GD3-31.

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[14] The Commission says that there was misconduct because the Claimant knew about his employer's mandatory COVID-19 vaccination policy and knew that he could be let go if he didn't comply with it, but decided not to comply anyway.⁸

[15] The Claimant agrees that he didn't comply with his employer's mandatory COVID-19 vaccination policy, but says there is no misconduct because his employer didn't address his request for more information about the COVID-19 vaccine and treated him unfairly.⁹

[16] I find that the Commission has proven that there was misconduct for the following reasons.

[17] I find the Claimant committed the actions that led to his dismissal, as he agrees that he refused to comply with his employer's mandatory COVID-19 vaccination policy.

[18] I further find the Claimant's actions were intentional as he made a conscious decision not to comply with his employer's mandatory COVID-19 vaccination policy.

[19] The Claimant told the Commission and testified that he didn't ask for an exemption from his employer's mandatory COVID-19 vaccination policy.¹⁰

[20] The Claimant says that he didn't get vaccinated because he had some concerns about the safety of the COVID-19 vaccine that his employer didn't address. He told the Commission and testified that he was worried that something bad could happen to him if he took the vaccine, so he asked his employer for more information about its safety as a condition for getting vaccinated. He told the Commission and testified that his employer didn't respond to his request.¹¹

[21] The Claimant testified that he felt it was reasonable for him to ask his employer for more information about the safety of the COVID-19 vaccine before he decided

⁸ GD4-3.

⁹ GD3-27.

¹⁰ GD3-27, GD3-38.

¹¹ GD3-27.

whether to get vaccinated. He didn't elaborate on why he felt this request was reasonable.

[22] I disagree with the Claimant. He couldn't explain why he felt his employer should answer his questions about the safety of the COVID-19 vaccine as a condition for him to get vaccinated. There's also no evidence that his employer has the necessary expertise to correctly answer specific questions about the safety of the COVID-19 vaccine.

[23] The Claimant also argues that another decision from the Tribunal involving an employer's mandatory COVID-19 policy shows that he didn't commit misconduct.¹²

[24] I understand the Claimant's argument, but I'm not bound by prior decisions of the Tribunal and must decide each case based on the facts before me.

[25] I also note that this other Tribunal decision was based on evidence that the employer only gave the employee two days notice to get vaccinated.¹³ There is no evidence before me that the Claimant's employer had a similar intention. Rather, there is evidence that they clearly communicated their policy to the Claimant two to three months in advance, as discussed more below. So, I don't give this other decision much weight here.

[26] The Claimant also told the Commission and testified that he felt his employer treated him unfairly by asking him to get vaccinated. He says that there's not enough evidence that the vaccine is safe and his family would be in trouble if something happened to him because he got sick after getting vaccinated.¹⁴

[27] Unfortunately, I can't decide whether an employer's conduct, including their policies, is fair or reasonable when looking at the issue of misconduct.¹⁵ I can only look at the Claimant's actions in relation to what the law says about misconduct. It is clear in

¹² *TC v Canada Employment Insurance Commission*, 2022 SST 891

¹³ *TC v Canada Employment Insurance Commission*, 2022 SST 891, 23-24.

¹⁴ GD3-27.

¹⁵ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

this case that the Claimant made a conscious decision to not comply with his employer's mandatory COVID-19 policy by refusing to get vaccinated.

[28] I also find the Claimant knew or should have known that refusing to comply with his employer's mandatory COVID-19 vaccination policy could lead to him losing his job.

[29] I note that the Claimant told the Commission and testified that his employer notified him in September 2021 and October 2021 that it was introducing a mandatory COVID-19 vaccination requiring employees to get vaccinated by November 30, 2021 or be placed on an unpaid leave of absence.¹⁶ The Claimant's employer also told the Commission that employees were notified in September 2021 and October 2021 about the new policy.¹⁷

[30] I also note that on December 1, 2021, the Claimant's employer sent him a letter saying he was being placed on an unpaid leave of absence because he had chosen not to get vaccinated and hadn't requested an exemption. The letter also said that the Claimant's status would be reviewed in four weeks and if he hadn't taken any steps towards getting vaccinated, he would likely be terminated with just cause.¹⁸

[31] The Claimant testified that he received the December 1, 2021 letter, but argued that he didn't think he would be fired because he shouldn't have to follow his employer's every order, especially if it potentially puts his health at risk.

[32] However, as mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct and can't decide whether an employer's conduct, including their policies, is fair or reasonable when looking at this issue.¹⁹

[33] In this case, the employer's December 1, 2021 letter clearly describes the consequences of not complying with their mandatory COVID-19 vaccination policy,

¹⁶ GD3-27.

¹⁷ GD3-31.

¹⁸ GD3-34.

¹⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282.

including likely termination four weeks later, as mentioned above. It also doesn't say anything about the policy being flexible.

[34] While I understand that the Claimant didn't think he would be fired even after choosing not to get vaccinated, I find that the evidence shows that he should have known that he could be let go.

[35] I therefore find that the Claimant's conduct is misconduct under the law since he committed the conduct that led to his dismissal (he refused to comply with his employer's mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known that his actions would lead to him being let go.

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

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

Conclusion

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

[38] This means that the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section