



Citation: *AS v Canada Employment Insurance Commission*, 2022 SST 1160

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

Decision

Appellant: A. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (477839) dated June 6, 2022 (issued by Service Canada)

Tribunal member: Amanda Pezzutto

Decision date: October 7, 2022

File number: GE-22-2041

Decision

[1] A. S. is the Claimant. The Canada Employment Insurance Commission (Commission) says he can't get Employment Insurance (EI) benefits. The Claimant disagrees with this decision, so he is appealing to the Social Security Tribunal (Tribunal).

[2] I am summarily dismissing the Claimant's appeal. His appeal has no reasonable chance of success. There is no argument the Claimant could make that would let me allow his appeal.

Overview

[3] The Claimant's employer introduced a vaccination policy. The employer told the Claimant that he had to provide proof of vaccination against COVID-19 to remain in his job. The employer asked him to provide proof of vaccination by November 1, 2021. The Claimant wasn't vaccinated by the employer's deadline. So, the employer suspended him.

[4] The Claimant says he didn't stop working because of misconduct. He says he has medical reasons for refusing the COVID-19 vaccine. He says his employer can't force him to take medical treatment. He says the employer breached his collective agreement.

[5] The Commission says the Claimant was suspended because of misconduct. The Commission says the Claimant knew that his employer required him to be vaccinated against COVID-19. The Commission says the Claimant knew he couldn't work if he wasn't vaccinated.

Matters I must consider first

[6] Before I summarily dismiss an appeal, I have to give the Claimant notice. I have to allow him a reasonable period to make arguments about whether I should summarily dismiss the appeal.¹

[7] Tribunal staff sent an email to the Claimant on September 15, 2022. In this letter, I explained why I was considering summarily dismissing his appeal. I asked him to respond to the letter by September 29, 2022.

[8] The Claimant responded to this letter before the deadline. I will consider his response as I make my decision.

Issue

[9] I must decide whether I should summarily dismiss the Claimant's appeal. To make this decision, I have to decide if his appeal has a reasonable chance of success.

Analysis

[10] I must summarily dismiss an appeal if the appeal has no reasonable chance of success.²

[11] This is what "no reasonable chance of success" means: is it plain and obvious, on the face of the record, that the Claimant's appeal is bound to fail? Are there any arguments or evidence that the Claimant could present at a hearing that would lead to a successful appeal?³

¹ Section 22 of the *Social Security Tribunal Regulations*

² Section 53(1) of the *Department of Employment and Social Development Act*.

³ In coming to this interpretation, I am relying on an Appeal Division decision, *J.S. v. Canada Employment Insurance Commission*, 2015 SSTAD 1132, and a Federal Court of Appeal decision, *Lessard-Gauvin v. Canada (Attorney General)*, 2013 FCA 147.

[12] The law says you can't get EI benefits if you lose your job because of misconduct. This applies whether the employer has suspended or dismissed you.⁴

[13] If you are suspended from your job because of misconduct, you are disentitled from receiving EI benefits. The disentitlement lasts until one of the following things happens:

- Your suspension ends;
- You lose your job or quit your job; or
- You work enough hours with another job to start a new claim for EI benefits.⁵

[14] To be misconduct under the law, your conduct has to be wilful. This means that your conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ You don't have to have wrongful intent (in other words, you don't have to mean to be doing something wrong) for your behaviour to be misconduct under the law.⁸

[15] There is misconduct if you knew or should have known that your conduct could get in the way of carrying out your duties towards your employer and that there was a real possibility of suspension or dismissal because of that.⁹

[16] The Commission has to prove that the employer suspended you because of misconduct. The Commission has to prove this on a balance of probabilities. This means the Commission has to show that it is more likely than not that you lost your job because of misconduct.¹⁰

⁴ Section 30 of the *Employment Insurance Act* says you are disqualified from receiving benefits if you are dismissed because of misconduct. Section 31 of the *Employment Insurance Act* says you are disentitled from receiving benefits if you are suspended because of misconduct.

⁵ Section 31 of the *Employment Insurance Act*.

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

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[17] The Commission says I should treat the Claimant's loss of employment as a suspension. I agree. I understand that the Claimant says that he is actually on an involuntary leave without pay. But he didn't choose to take a leave of absence. He didn't stop working because of a shortage of work. His employer put him on unpaid leave because he didn't follow a policy. I find that this is the same thing as a suspension.

[18] The Claimant says he didn't lose his job because of misconduct. He says that his employer can't force him to take a medical procedure. He says that he has medical reasons for refusing the COVID-19 vaccine. He says that there isn't any misconduct because his employer doesn't call it misconduct.

[19] The Commission says that the Claimant stopped working because of misconduct. The Commission says he knew about his employer's vaccination policy. He knew that the employer required him to be vaccinated against COVID-19. The Commission says he knew that he couldn't keep working if he wasn't vaccinated and if he didn't attest to his vaccination status by the employer's deadline.

[20] I agree with the Commission. I find that this appeal has no reasonable chance of success. This is because I find that the Claimant lost his job because of misconduct. There is no argument or evidence that would lead me to a different conclusion.

[21] The Claimant and the employer agree on many of the basic facts about the vaccine policy requirement and the deadline. The Claimant agrees that his employer had a policy that required him to be vaccinated against COVID-19 and to attest to his vaccination status. He agrees that the employer first told him about the policy in October 2021. He knew that the deadline for vaccination was November 1, 2021. He knew that the employer wouldn't let him keep working if he wasn't vaccinated against COVID-19.

[22] The Claimant says he has medical reasons for refusing the COVID-19 vaccine. He also says his employer changed the terms of his employment contract. He says the employer can't force him to take any medical procedures.

[23] But it is not up to the Tribunal to decide if the employer acted fairly by introducing a vaccination policy.¹¹ It is not up to the Tribunal to decide if the COVID-19 vaccine is safe or effective. I can't make decisions about whether the employer should have granted him an exemption to the policy. And I can't make decisions about whether the employer violated the terms of the Claimant's collective agreement. The Claimant can pursue other measures through a human rights tribunal or his union if he wants to make these arguments.

[24] My only role is to decide if the Claimant's appeal is bound to fail, no matter what arguments or evidence he could present at a hearing. And I find that this appeal is bound to fail. This is because the Claimant lost his job because of misconduct, under the meaning of the *Employment Insurance Act*. This is because the Claimant and the Commission agree about the following:

- The employer suspended the Claimant because he wasn't vaccinated against COVID-19 and didn't attest to his vaccination status. In other words, his refusal to be vaccinated and his refusal to attest to his vaccination status caused the loss of employment.
- The Claimant knew his employer had a policy requiring all employees to be vaccinated against COVID-19 by November 1, 2021. Even so, he deliberately chose to refuse the COVID-19 vaccine.
- The Claimant knew he would lose his job if he didn't follow their vaccination policy.

[25] If I accept all of these facts, then I have to find that the employer suspended the Claimant because of misconduct. The Claimant's failure to follow the vaccination policy led directly to his suspension. He acted deliberately. He knew his actions were likely to lead to the loss of his job.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282, especially paragraphs 31 and 34.

[26] Even if the employer calls the Claimant's loss of employment something other than misconduct, I still have to make my own decision about why he stopped working. This is because I have to look at the arguments and evidence and decide how the *Employment Insurance Act* applies.

[27] And based on the facts in this appeal, there is no argument that the Claimant could make that would lead me to a different conclusion. There isn't any evidence that contradicts these facts. His appeal is bound to fail, no matter what arguments or evidence he could provide at a hearing.

Conclusion

[28] I find that the Claimant's appeal has no reasonable chance of success. So, I must summarily dismiss his appeal.

Amanda Pezzutto
Member, General Division – Employment Insurance Section