



Citation: *WS v Canada Employment Insurance Commission*, 2022 SST 1572

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

Decision

Appellant (Claimant): W. S.

Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (467750) dated May 5, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy

Type of hearing: Videoconference

Hearing date: October 5, 2022

Hearing participant: Appellant

Decision date: October 6, 2022

File number: GE-22-1919

Decision

[1] The appeal is dismissed.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended and 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 was disentitled from Employment Insurance (EI) benefits from November 28, 2021, to December 31, 2021, and disqualified from receiving EI benefits from January 2, 2022.¹

Overview

[3] The Claimant was placed on an unpaid leave of absence from his job as a Distribution Engineer on October 29, 2021, and lost his job on January 4, 2022. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence and then let go because he failed to comply with their vaccination policy.

[4] The Commission accepted the employer's reason for the unpaid leave of absence (suspension) and dismissal. It decided that the Claimant was suspended and lost his job because of misconduct. Because of this, the Commission decided the Claimant was disentitled from EI benefits from November 28, 2021, to December 31, 2021, and disqualified from receiving EI benefits from January 2, 2022.

[5] The Commission says the Claimant willfully refused to comply with the employer's vaccination policy knowing he would be dismissed.

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

Section 30 of the *Employment Insurance Act* (EI 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 which are: (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 of the EI Act to qualify to receive benefits.

[6] The Claimant says there was no misconduct on his part. He says the employer changed his employment contract and their vaccination policy wasn't reasonable.

Issue

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

Analysis

[8] 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?

[9] I find the Claimant was suspended and dismissed because he failed to comply with the employer's vaccination policy.

[10] The Commission says the reason the employer gave is the reason for the suspension and dismissal. The employer told the Commission that the Claimant didn't comply with their vaccination policy.

[11] The Claimant doesn't dispute that he was suspended and dismissed for failing to comply with the employer's vaccination policy. However, the Claimant says the employer's vaccination policy wasn't reasonable.

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

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

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

[14] 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

[15] 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

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

[17] The Commission says there was misconduct because the Claimant willfully refused to comply with the employer's vaccination policy knowing he would be terminated from his employment.

[18] The Claimant says there was no misconduct, because the employer changed the employment contract and their vaccination policy was unreasonable.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was fully aware of the employer's vaccination policy and the consequences for failing to comply with this policy (GD3-25). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees who failed to comply with the policy might be subject to discipline up to and "including termination" (GD3-40 to GD3-45). I realize the Claimant testified that the employer changed his employment contract and their vaccination policy was

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

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

unreasonable. However, the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for the Claimant to make these arguments.⁷

Additional Testimony from the Claimant

[20] I recognize the Claimant further testified that he took legal action against his employer and was awarded severance monies. The Claimant further explained the employer amended his Record of Employment and the document now stated dismissed without cause. Nevertheless, the only issue before me was whether the Claimant was suspended and dismissed for misconduct. On this matter, I must apply the EI Act and the legal test for misconduct as documented above. In other words, I cannot ignore the law even for sympathetic reasons.⁸

[21] Finally, I realize the Claimant argued the employer had reasonable alternatives to implementing their vaccination policy. However, as mentioned the matter of determining whether the employer's policy was unfair or unreasonable was beyond my jurisdiction.⁹

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

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

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

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

⁹ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

Conclusion

[23] The Commission has proven the Claimant was suspended and lost his job because of misconduct. Because of this, the Claimant was disentitled from EI benefits from November 28, 2021, to December 31, 2021, and disqualified from receiving EI benefits from January 2, 2022.

[24] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section