



Citation: *AJ v Canada Employment Insurance Commission*, 2022 SST 1559

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

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

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (463831) dated April 19, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference
Hearing date: November 16, 2022
Hearing participant: Appellant
Decision date: December 2, 2022
File number: GE-22-2264

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 is disqualified from receiving Employment Insurance (EI) benefits from October 30, 2021.¹

Overview

[3] The Claimant worked as an Accounts Payable Analyst and was placed on an unpaid suspension effective November 1, 2021. The Claimant was then dismissed from his job on January 3, 2022. The Claimant's employer ("X") said the Claimant was suspended and then let go because he didn't comply with their vaccination policy.

[4] The Commission accepted the employer's reason for the 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 disqualified from receiving EI benefits from October 30, 2021.

[5] The Commission says the Claimant was made aware of the employer's vaccination policy and the consequences of failing to comply.

[6] The Claimant says he didn't want to be vaccinated for religious reasons. He further says the employer could have accommodated him because he was working from home.

Issue

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

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

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 from his job?

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

[10] 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 then dismissed for failing to 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 changed his employment contract.

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

Is the reason for the Claimant's suspension and 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

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

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 or 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 was made aware of the employer's vaccination policy and the consequences of failing to comply with the policy.

[18] The Claimant says there was no misconduct because he didn't do anything that could be considered misconduct.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was aware that if he wasn't fully vaccinated by November 1, 2021, his employment could be terminated (GD3-25). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees who didn't comply with their policy may be subject to discipline up to and including dismissal (GD3-53). I realize the Claimant testified that the employer could have accommodated him. 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

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.

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

Additional Testimony and Submissions from the Claimant

[20] I realize the Claimant further argued that he didn't do anything that was misconduct. However, I must apply the legal test for misconduct as explained above. In other words, I cannot ignore the law even in the most sympathetic cases.⁸

[21] I further recognize the Claimant included a Record of Employment that indicated a coding for shortage of work. Nevertheless, I agree with the Commission that modifying the coding on the Record of Employment at this time wouldn't alter the circumstances surrounding the actual reason for separation. In short, entitlement to EI benefits wouldn't change since the real reason for separation did not change (GD4).

[22] Finally, I recognize the Claimant was denied a religious exemption by the employer. I do realize the Claimant was frustrated and displeased with the employer on this matter. However, as mentioned above the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction.⁹ In summary, the only issue before me is whether the Claimant was suspended and dismissed because of misconduct.

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.

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

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

Conclusion

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

[25] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section