



Citation: *JC v Canada Employment Insurance Commission*, 2022 SST 1622

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

Decision

Appellant: J. C.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (500185) dated August 5, 2022 (issued by Service Canada)

Tribunal member: Peter Mancini

Type of hearing: Videoconference

Hearing date: October 31, 2022

Hearing participants: Appellant

Decision date: November 11, 2022

File number: GE-22-2816

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his work because of misconduct (in other words, because he did something that caused him to lose his job). This means that the Claimant is disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended from his job. The Claimant's employer said he was suspended for violation of a company policy regarding a vaccine requirement. He was advised to get a vaccine by a certain date unless he was medically exempt. He was not exempt and did not get the vaccine.

[4] Even though the Claimant doesn't dispute that this happened, he says that it isn't the real reason why the employer let him go. The Claimant says that the employer actually let him go because he disputed the policy. He believed the company had not done the necessary research to require employees to be vaccinated. He says the Commission is in collusion with the Federal government and that the Federal Government is trying to force Canadians to be vaccinated. The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from his employment because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

Issue

[5] Was the Claimant suspended from his employment because of misconduct?

¹ Section 31 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

Analysis

[6] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has let you go or suspended you. To answer the question of whether the Claimant was suspended from employment because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[7] I find that the Claimant was suspended from his employment because he refused to comply with the company policy that required him to obtain a vaccine within the time required by his employer. The non-compliance with his employer's vaccination policy triggered the separation from employment. Although the employer may have called it a "leave of absence without pay", the employer effectively suspended the Claimant in response to his non-compliance with the vaccination policy

[8] The Claimant and the Commission don't agree on why the Claimant was suspended. The Commission says that the reason the employer gave is the real reason for the suspension. The employer told the Commission that the Claimant was required to get a vaccine pursuant to policy and he refused to do so.

[9] The Claimant disagrees. The Claimant says that the real reason he was suspended is that the policy was misguided. He agrees that he did not get the vaccine, but felt he should not have had to get the vaccine. He told the company they had not done the necessary testing to ensure the safety of the vaccine. He also disputes the finding of the Commission that he committed misconduct. He submitted numerous news articles, opinion pieces and reports to the tribunal to support his view. He submitted these up until a day before the hearing.

[10] I find that the reason the Claimant was suspended is because he refused to follow the company policy to get a vaccine. There is no dispute on this point. The Claimant said he was on vacation in August of 2021. Before he went on vacation the

company had a policy of testing employees for Covid 19. He had no problem accepting the testing policy of the company. When he returned from vacation he received an email from his employer. The email advised employees that they had to have at least one Covid 19 vaccine before October 15, 2021. There was an option to request an exemption from being vaccinated for medical reasons. However, failure to take the vaccine would result in a suspension without pay. The Claimant went to three different doctors to request a medical exemption. He was not given one. The Claimant challenged the employer's policy to get a vaccine for Covid 19. He said the company was not bound to mandate the policy and that the company did not perform its due diligence by testing the vaccine before requiring the employees to take it. He says they were implementing the vaccine policy for political reasons. (GD 3-37)

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

[11] The reason for the Claimant's suspension is misconduct under the law.

[12] The Employment Insurance Act (Act) doesn't say what misconduct means. But case law (decisions from courts and tribunals) shows us how to determine whether the Claimant's dismissal is misconduct under the Act. It sets out the legal test for misconduct and the questions and criteria to consider when examining the issue of misconduct.

[13] The law doesn't say I have to consider how the employer behaved. Instead I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the act.

[14] I have to focus on the act only. I cannot make decisions about whether the Claimant has options under any other laws. Issues about whether the Claimant was wrongfully dismissed or whether the employer should have made reasonable arrangements (accommodations) for the Claimant aren't for me to decide. I can only consider one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[15] 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

[16] 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.⁵

[17] The Commission has to prove that the Claimant was suspended 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 because of misconduct.⁶

[18] The Commission says that there was misconduct because the Claimant refused to follow a policy of the Company and he knew that by doing so he could be placed on a leave of absence without pay. He did not follow the policy deliberately.

[19] The Claimant says that there was no misconduct because there is no definition of misconduct in the Employment Insurance Act, and he says the jurisprudence that defines misconduct can't be applied because there is no authority for the courts to define misconduct. He says he was not wrong to refuse the vaccine because the company was not legally obliged to introduce the policy and the policy was not properly reviewed before being implemented.

[20] I find that the Commission has proven that there was misconduct, because the Claimant willfully refused to follow the company policy. In doing so, he knew or should have known that he could be suspended or lose his job. The Claimant does not deny

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.

the fact that he refused to follow the policy. The Claimant has his own definition of misconduct and refuses to accept the definitions' as stated in the footnoted cases. While the Claimant can dispute the jurisprudence, the Tribunal is bound by it and I accept its authority.

[21] I find that the policy was communicated to the Claimant by the company. The consequences of failure to follow the policy were communicated to the Claimant, and the Claimant knew that if he did not get a vaccine before October 15th 2021 he would be placed on a leave without pay. He did not qualify for a medical exemption. He disagreed with the company policy and deliberately refused to follow the policy

So, was the Claimant suspended from his job because of misconduct?

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

Conclusion

[23] The Commission has proven that the Claimant was suspended from his job because of misconduct. Because of this, the Claimant is disentitled from receiving EI benefits.

[24] This means that the appeal is dismissed.

Peter Mancini
Member, General Division – Employment Insurance Section