



Citation: *TS v Canada Employment Insurance Commission*, 2023 SST 152

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

Decision

Appellant (Claimant): T. S.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (482642) dated August 18, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference
Hearing date: December 22, 2022
Hearing participant: Appellant
Decision date: January 10, 2023
File number: GE-22-2909

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 did something that caused him to be suspended and to lose his job). This means the Claimant was disentitled from receiving Employment Insurance (EI) benefits from November 12, 2021, to January 24, 2022, and disqualified from receiving EI benefits from January 23, 2022.¹

Overview

[3] The Claimant worked as an Airport Equipment Operator and was placed on an unpaid leave of absence by his employer on November 15, 2021 (last day paid November 11, 2021). The Claimant then lost his job on January 25, 2022. The Claimant's employer ("X") said the Claimant was suspended and let go because he didn't comply with their mandatory vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence and letting him go. It decided that the Claimant was suspended and dismissed because of misconduct. Because of this, the Commission decided the Claimant was disentitled from receiving EI benefits from November 12, 2021, to January 24, 2022, and disqualified from receiving EI benefits from January 23, 2022.

[5] The Commission says the Claimant's action of failing to comply with the employer's vaccination policy was conscious and intentional, and taken in full knowledge it would result in a loss of employment.

¹ Section 31 of the *Employment Insurance Act* says a claimant who is suspended from his employment because of his misconduct is not entitled to receive EI benefits until he meets one of the following provisions: (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 to qualify to receive benefits.

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

[6] The Claimant says the employer didn't provide any protection or accommodation with their vaccination policy.

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 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 the Claimant was suspended and dismissed from his job. The employer told the Commission that the Claimant was placed on an unpaid leave of absence and then dismissed because he didn't comply with their vaccination policy.

[11] The Claimant says he wasn't suspended from his employment, but instead was placed on an unpaid leave of absence.

[12] I find the reason for the Claimant was suspended and lost his job was because he didn't comply with the employer's vaccination policy. I realize the Claimant argued that the employer never used the word suspension. However, I agree with the Commission that because the **employer initiated** the separation from employment (owing to the Claimant's non-compliance with their vaccination policy) this would be considered a suspension.

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 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's action of failing to comply with the employer's vaccination policy was conscious and intention, and taken in full knowledge that it would result in a loss of employment.

[18] The Claimant says there was no misconduct because the employer's vaccination policy lacked informed consent.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was **aware** he could be suspended or dismissed for failing to comply with

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 employer's vaccination policy (GD3-43). Furthermore, the Commission provided a copy of the employer's vaccination policy which stated that employees would be placed on an administrative leave and then "terminated for cause" if they didn't comply with the policy (GD3-29). I realize the Claimant testified that the employer's vaccination policy lacked informed consent and wasn't included in his employment contract. However, the matter of determining whether the employer's policy was fair or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.⁷

Additional Testimony and Submissions from Claimant

[20] I realize the Claimant further testified that he was concerned about his bodily autonomy and the vaccine was still being trialed. Nevertheless, the effectiveness of the vaccine was not an issue before me. The only issue before me was whether the Claimant was suspended and dismissed from his job because of misconduct. On this matter I must apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.⁸

[21] I further recognize the Claimant argued that his employer never used the term misconduct when he was dismissed. However, the Claimant's employer stated the Claimant was initially suspended and then dismissed for not complying with their vaccination policy. On this matter, I must apply the legal test for misconduct as established in the case law.

[22] Finally, I recognize the Claimant testified that he was denied a medical exemption from the vaccination policy. I realize the Claimant was frustrated and unhappy about this situation. Nevertheless, as mentioned the matter of determining whether the employer's vaccination policy was fair or reasonable wasn't within my jurisdiction.⁹

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.

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.

Conclusion

[24] The Commission has proven that the Claimant was suspended and lost his job because of misconduct. Because of this, the Claimant was disentitled from receiving EI benefits from November 12, 2021, to January 24, 2022, and disqualified from receiving EI benefits from January 23, 2022.

[25] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section