



Citation: *JD v Canada Employment Insurance Commission*, 2022 SST 1664

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

Decision

Appellant: J. D.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (483327) dated June 9, 2022 (issued by Service Canada)

Tribunal member: Linda Bell

Type of hearing: Teleconference

Hearing date: November 30, 2022

Hearing participant: Appellant

Decision date: December 16, 2022

File number: GE-22-2252

Decision

[1] I am dismissing the appeal. I disagree with the Appellant (Claimant).

[2] The Canada Employment Insurance Commission (Commission) has shown the Claimant lost his job because of misconduct (in other words, because he did something that caused him to be suspended and then dismissed). This means the Claimant is disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant was suspended and then dismissed from his job. The Claimant's employer says he was suspended and then let go because he went against its COVID-19 vaccination policy. He refused to get vaccinated.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct.

[5] The Commission accepted the employer's reason for the dismissal. It decided the Claimant was suspended and then lost his job because of misconduct. Because of this, the Commission decided the Claimant is not entitled to and disqualified from receiving EI benefits.

[6] The Claimant says the Commission didn't make the proper decision because there are inconsistencies in how it came to the decision. He says the employer refused to consider his medical note. He filed a grievance through his union. His union agrees he was wrongfully dismissed. His employer recently told him he will receive more information in the coming days regarding his full reinstatement.

¹ See sections 30 and 31 of the *Employment Insurance Act (Act)*.

Matters I have to consider first

Potential added party

[7] Sometimes the Tribunal sends the Claimant's former employer a letter asking if they want to be added as a party to the appeal. To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal. This is because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

Late evidence

[8] In the interest of justice, I have accepted all documents and submissions received by December 5, 2022.² During the November 30, 2022, hearing, I gave the Claimant permission to submit any documents he wished to rely upon no later than December 5, 2022.

[9] The Claimant's late documents were relevant to the issues under appeal. The Commission received copies of those late documents. So, I find there would be no prejudice to either party if the late documents were accepted.

Issues

[10] Did the Claimant lose his job because of misconduct?

Analysis

[11] The law says that you can't get EI benefits if you lose your job because of misconduct. This applies when the employer has suspended you or let you go.³

[12] To answer the question of whether the Claimant lost his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant lost

² The Tribunal has a Practice Direction outlining the procedure for when to send supporting documents. This says that the Tribunal Member may grant a party permission to submit late documents, after the hearing started.

³ See sections 30 and 31 of the Act.

his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[13] I find the Claimant lost his job because he didn't comply with the employer's mandatory COVID-19 vaccination policy. Specifically, the employer advised their employees they had to be fully vaccinated by October 30, 2021.

[14] The Commission says the Claimant's employer put him on an unpaid leave (suspended him) as of October 30, 2021. Then the employer dismissed him effective January 3, 2022, because he failed to comply with the employer's COVID-19 vaccination policy.

[15] The Claimant says he chose not to share his vaccination status or provide proof of vaccination to his employer. He says the only reason he would get vaccinated against COVID-19 would be to keep his job. But the employer fired him so he isn't going to get vaccinated.

[16] The Claimant told the Commission the employer's policy required him to have the first vaccine by September 30, 2021. He chose not to be vaccinated. Then he tested positive with COVID-19 around Thanksgiving (approximately October 8, 2021).

[17] The Claimant says he followed all COVID guidelines for social distancing and masking requirements. He submitted a medical note to his employer, dated October 27, 2021, but the employer refused to grant him a medical exemption. He confirmed he never followed up with his doctor about getting the vaccine. The Claimant agrees he was suspended and then dismissed because he failed to comply with the employer's COVID-19 vaccination policy.

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

[18] Yes. I find the Commission has proven there was misconduct. Here is what I considered.

[19] The *Employment Insurance Act* (EI 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 EI Act. It sets out the legal test for misconduct—the questions and criteria to consider when examining the issue of misconduct.

[20] Case law says that, to be misconduct, the conduct has to be wilful. This means the Claimant's conduct was conscious, deliberate, or intentional.⁴ Misconduct also includes conduct that is so reckless that it is almost wilful.⁵ 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.⁶

[21] 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 there was a real possibility of being let go because of that.⁷

[22] The law doesn't say I have to consider how the employer behaved.⁸ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the EI Act.⁹

[23] I have to focus on the EI law only. I can't make any decisions about whether the Claimant has other options under 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.¹⁰ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the EI Act.

⁴ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁵ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁶ See *Attorney General of Canada v Secours*, A-352-94.

⁷ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁸ See section 30 of the EI Act.

⁹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[24] The Commission has to prove the Claimant lost his job 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, the Claimant lost his job because of misconduct.¹¹

[25] The Commission says there was misconduct because the Claimant's non-compliance with the employer's COVID-19 vaccination policy was a deliberate choice. He was aware of the policy and had sufficient opportunity to comply with it; however, he made a wilful choice not to follow it. This wilful act of non-compliance constitutes misconduct as it led to the loss of employment.

[26] The employer implemented a policy and communicated it to employees. The Claimant was informed about the consequences of non-compliance with the policy. The Claimant's suspension and subsequent dismissal were directly caused by his non-compliance.

[27] The Claimant says he was wrongfully terminated. He admits knowing that he was required to report his vaccination status and to have the first vaccine by September 30, 2021. He also knew that failure to comply with the policy would result in disciplinary action "up to and including dismissal." He argued he found the wording "up to and including dismissal" to be vague.

[28] I find the Claimant made a deliberate choice not to comply with the employer's policy. This conduct was a breach of the employer's policy and he knew, or ought to have known, it would result in discipline, up to and including the employer placing him on an unpaid leave from his employment (suspending him) and dismissal.

[29] The evidence on file shows me the communications issued by the employer clearly state the next steps regarding the enforcement of the policy.¹² There is no ambiguity in the statement, "...if they have not received both doses, they will be suspended for six weeks without pay." Nor is there ambiguity in the statement, "After the

¹¹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹² See the employer's October 6, 2021, email at page GD3-33.

unpaid suspension... their employment will be terminated for cause as they will have chosen not to comply with the mandatory vaccination policy.”

[30] The policy clearly states employees must declare their vaccination status and must be fully vaccinated unless they receive an approved exemption from the employer. The Claimant submitted an accommodation request but it was refused. This means he was required to be vaccinated and report his vaccination status in order to comply with the policy.

[31] I acknowledge the Claimant has a right to decide whether to be vaccinated or disclose his vaccination status, but he knew there were consequences if he refused to follow the vaccination policy, which in this case was suspension and dismissal from his employment. I also acknowledge the employer has a right to manage their day-to-day operations, which includes the authority to develop and impose practices and policies at the workplace, to ensure the health and safety of all their employees and clients.

[32] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment that is insured against must be involuntary. This is not an automatic right, even if a claimant has paid EI premiums.

[33] The Federal Court and Federal Court of Appeal have both said the question of whether an employer has failed to accommodate an employee under human rights law is not relevant to the question of misconduct under the EI Act. This is because it is not the employer’s conduct at issue. Such issues may be dealt with in other forums.¹³

[34] I do not have the authority to determine whether the employer’s vaccination policy was unlawful or against the collective agreement. Equally, I do not have the authority to decide whether the employer breached any of the Claimant’s rights as an employee when they suspended and dismissed him, or whether they could or should have accommodated him in some other way. The Claimant’s recourse against his

¹³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36 and *Canada (Attorney General) v McNamara*, 2007 FCA 107. See also *Paradis v Canada (Attorney General)*, 2016 FC 1282.

employer is to pursue his claims through a union, in Court, or any other tribunal that may deal with those particular matters.

[35] In my view, the Claimant didn't lose his job involuntarily. This is because the Claimant chose not to comply with the employer's policy, which is what led to his dismissal. He acted deliberately. He knew that refusing to disclose his vaccination status or to get vaccinated was likely to cause him to lose his job. So I find the Claimant was suspended and then dismissed from his job because of misconduct.

Conclusion

[36] The appeal is dismissed.

Linda Bell

Member, General Division – Employment Insurance Section