



Citation: *AS v Canada Employment Insurance Commission*, 2022 SST 1709

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

Decision

Appellant: A. S.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (446650) dated January 11, 2022
(issued by Service Canada)

Tribunal member: Solange Losier

Type of hearing: Teleconference

Hearing date: June 1, 2022

Hearing participant: Appellant

Decision date: June 14, 2022

File number: GE-22-759

Decision

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

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

Overview

[3] The Claimant worked as a driver. The employer dismissed the Claimant because he did not comply with their covid19 vaccination policy at work. The Claimant then applied for EI regular benefits.²

[4] The Commission decided that the Claimant was not entitled to receive EI benefits because he lost his employment due to his own misconduct.³

[5] The Claimant disagrees because employer's policy is not the law. He argues that the policy violates his human rights, *Canadian Charter of Rights and Freedoms* (Charter) and the Nuremberg code for vaccine requirements.⁴ As well, he says that he never received a warning for his conduct and there was no chance to correct the issue.⁵

Issue

[6] Did the Claimant lose his job 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 EI benefits.

² See application for benefits at GD3-3 to GD3-18; termination letter at GD9-4.

³ See initial decision at GD3-24 to GD3-25 to reconsideration decision at GD3-35 to GD3-36.

⁴ See *Canadian Charter of Rights and Freedoms*, s 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

⁵ See GD2; GD2A; GD2B; GD2c.

Analysis

[7] The law says that Claimants who lose their job because of misconduct are disqualified from receiving EI benefits.⁶

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

Why did the Claimant lose his job?

[9] The Claimant said he started his job sometime in June 2018 and worked as a driver. He testified that he was dismissed from his job on September 17, 2021 for not showing proof of his covid19 vaccination. He had to turn in his keys back to the employer.

[10] I find that the Claimant lost his job because he was dismissed on September 17, 2021 for not following the employer's covid19 vaccination policy (policy). This is consistent with the Claimant's testimony, the employer's discussion with the Commission, the termination letter in the file and record of employment that shows he was dismissed.⁷

What was the employer's policy?

[11] The Claimant testified that his employer had a policy that required employees to have two covid19 vaccinations. He looked at the policy and there was a tentative deadline for June or July 2021. The firm deadline to be vaccinated was September 17, 2021.

⁶ See section 30 of the EI Act.

⁷ See termination letter at GD9-4; record of employment at GD3-19; employer's discussion with the Commission at GD3-23; GD3-33.

[12] The employer told the Commission that employees were given over 3 months to obtain their first vaccination.⁸

[13] I note there is no copy of the policy in the file supplied by the Commission and the Claimant said he does not currently have a copy of the policy either. The Claimant has made a request to get a copy of the policy from the employer, as well as other documents.

Was the policy communicated to the Claimant?

[14] The Claimant agrees that the policy was communicated to him sometime in between March 2021 and May 2021. He remembered receiving an email sent to all staff about the covid19 vaccination requirement.

[15] The Claimant told his supervisor about his concerns on at least two occasions. She first told him not to worry about it, but then later said that the Board of Directors was not willing to accommodate him by allowing him to test or use his own vehicle.

What were the consequences of not complying with the policy?

[16] The Claimant said that he expected the employer would accommodate him because he did not want to comply with the policy for personal reasons. Although, he admitted that he knew dismissal might happen.

[17] The employer told the Commission that they had strict policies and employees were aware they would be dismissed.⁹

Is there a reason the Claimant could not comply with the policy?

[18] The employer told the Commission that the Claimant did not have an exemption for the covid19 vaccination.¹⁰

⁸ See GD3-33.

⁹ See GD3-33.

¹⁰ See GD3-23.

[19] The Claimant told the Commission that he did not have a medical condition or religious reason to not take the vaccine.¹¹

[20] At the hearing, the Claimant explained that he was not aware he could make a request for an exemption because his supervisor did not tell him.

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

[21] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.¹² Misconduct also includes conduct that is so reckless that it is almost wilful.¹³

[22] The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.¹⁴

[23] 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.¹⁵

[24] The Commission has to prove that the Claimant 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 lost his job because of misconduct.¹⁶

[25] I find that the Commission has proven that there was misconduct for the following reasons.

¹¹ See GD3-34.

¹² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

¹⁴ See *Attorney General of Canada v Secours*, A-352-94.

¹⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

[26] First, I find that the Claimant willfully and consciously chose not to comply with the policy. The policy was communicated to the Claimant a few months in advance and there was enough time to comply. He made a deliberate choice to not comply with the policy for personal reasons, and this resulted in losing his employment. As noted above, the Claimant does not have to have wrongful intent for it to be misconduct.¹⁷

[27] Second, I find that the Claimant knew or ought to have known that he would be dismissed for not complying with the employer's policy to be vaccinated by September 17, 2022.

[28] The Claimant received a copy of the policy at his work email and reviewed it. While the policy is not included in the file, it likely addressed the consequences of non-compliance, specifically dismissal. I am also relying on the employer's discussion with the Commission that confirmed employees knew they would be dismissed for their failure to comply with the policy.¹⁸

[29] I was not persuaded by the Claimant's argument that he was not given a warning, or a chance to correct his conduct because he had several months to comply with the policy. The Claimant said there was a tentative deadline to comply in June or July 2021 and a firm deadline to be vaccinated was September 17, 2021. At any point, he could have complied with the policy before the deadline.

[30] Third, the Claimant could have made a request for an exemption from the policy to the employer, but did not do so. He told the Commission that he did not have a medical condition or religious reason to not take the vaccine.¹⁹ As a result, I find that he has not proven he was exempt from the policy.

¹⁷ See *Attorney General of Canada v Secours*, A-352-94.

¹⁸ See GD3-23; GD3-33.

¹⁹ See GD3-34

[31] Lastly, I acknowledge that the Claimant has the authority to decide whether he wants to be vaccinated. I also acknowledge that the employer has the authority to manage their day-to-day operations, which may include the development of policies at the workplace.

[32] The purpose of the *Employment Insurance Act* is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment which is insured against must be involuntary.²⁰ This is not an automatic right, even if a Claimant has paid EI premiums.

[33] In this case, the Claimant was not terminated involuntarily because it was his non-compliance with the employer's policy that led to his dismissal. Based on my findings above, I find that the Claimant lost his job because of misconduct.

What about the Claimant's other arguments?

[34] The Claimant raised several other arguments, including some of the following:

- a) The vaccine is unsafe and unproven
- b) He has filed criminal charges against his employer
- c) His human rights were breached
- d) His Charter rights were breached because vaccines are not mandatory
- e) His employer should have accommodated him
- f) His employer contract does not require vaccination, etc.

[35] I acknowledge that the Claimant disagrees with the employer's policy for many reasons. He feels that he was treated unfairly by the employer and that they could have accommodated him.

²⁰ *Canada (Canada Employment and Immigration Commission) v Gagnon*, [1988] 2 SCR 29.

[36] However, I do not have the authority to decide whether the employer breached any of his rights as employee when they dismissed him, or whether they could have accommodated him in some other way.

[37] The court has stated that Tribunals have to focus on the conduct of the Claimant, not the employer. The question is not whether the employer was guilty of misconduct by dismissing the Claimant such that this would constitute unjust dismissal, but whether the Claimant was guilty of misconduct and whether this misconduct resulted in losing their employment.²¹

[38] As well, the court has said that the role of Tribunals is not to determine whether a dismissal by the employer was justified or was the appropriate sanction.²²

[39] I have to determine whether the Claimant's conduct amounted to misconduct within the meaning of the *Employment Insurance Act*.²³ Based on the facts of this case, I have decided that the Claimant's conduct does amount to willful misconduct.

[40] The Claimant's recourse against his employer is to pursue her claims in court, or any other Tribunal that may deal with these particular matters. I note that the Claimant has already advised that he is pursuing criminal charges against his employer.

Conclusion

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

[42] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

²¹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107; *Fleming v Canada (Attorney General)*, 2006 FCA 16.

²² See *Canada (Attorney General) v Caul*, 2006 FCA 251.

²³ See *Canada (Attorney General) v Marion*, 2002 FCA 185.