



Citation: *NZ v Canada Employment Insurance Commission*, 2022 SST 1710

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

Decision

Appellant: N. Z.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (474110) dated May 25, 2022 (issued by Service Canada)

Tribunal member: Elizabeth Usprich

Type of hearing: Teleconference

Hearing date: October 12, 2022

Hearing participant: N. Z.
Appellant

Decision date: October 17, 2022

File number: GE-22-2135

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, N.K., lost his job. The Claimant did not follow his employer's COVID-19 vaccination policy. The employer put the Claimant on a leave of absence from October 18, 2021. The leave of absence was to end November 26, 2021. The Claimant did not hear from the employer until he received a termination letter on December 6, 2021. The Claimant then applied for Employment Insurance (EI) regular benefits.

[4] Even though the Claimant doesn't dispute that this happened, he says that going against his employer's vaccination policy isn't misconduct. Additionally, the termination letter said that he was dismissed without cause.

[5] The Commission accepted the employer's reason for the dismissal. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

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 benefits.

Analysis

[7] 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.²

[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] I find that the Claimant lost his job because he did not follow his employer's mandatory vaccination policy. The Claimant agrees that he was let go because he did not follow his employer's vaccination mandate. The Claimant does not feel it is misconduct for not following the mandate. The Claimant feels that it was discriminatory for his employer to not have a religious accommodation. The Claimant feels he should be entitled to benefits.

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

[10] The reason for the Claimant's dismissal is misconduct under the law.

[11] 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—the questions and criteria to consider when examining the issue of misconduct.

[12] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.³ Misconduct also includes conduct that is so reckless that it is almost wilful.⁴ The Claimant doesn't have to have

² See sections 30 and 31 of the Act.

³ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁴ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

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.⁵

[13] 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.⁶

[14] The law doesn't say I have to consider how the employer behaved.⁷ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.⁸

[15] I have to focus on the Act 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 are not for me to decide.⁹ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[16] 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.¹⁰

[17] The Commission says that there was misconduct because:

- the employer had a vaccination policy;
- the employer clearly notified the Claimant about its expectations about getting vaccinated, telling the employer it whether he had been vaccinated and getting tested regularly;

⁵ See *Attorney General of Canada v Secours*, A-352-94.

⁶ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁷ See section 30 of the Act.

⁸ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

⁹ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹⁰ See *Minister of Employment and Immigration v Bartone*, A-369-88.

- the employer sent emails to the Claimant and spoke to the Claimant several times to communicate what it expected; and
- the Claimant knew or should have known what would happen if he did not follow the policy

[18] The Claimant says that there was no misconduct because the employer's vaccination policy was unfair and unsafe.

[19] The employer's vaccination policy says that all employees "are expected to receive a COVID-19 vaccine unless it is medically contraindicated. If a worker is not vaccinated, they are expected to comply with additional training and weekly testing protocols."¹¹

[20] The employer¹² and the Claimant¹³ agree that the Claimant was unvaccinated and refused to undergo Rapid Antigen Testing.

[21] The employer's policy says if there is non-compliance with the policy that it will result in "disciplinary action up to and including termination of employment."¹⁴

[22] The Claimant believes that his employer was attempting to coerce him into getting the vaccine. The Claimant feels that his employer was asking him to choose between getting an unproven vaccine or be unemployed. The Claimant said that he is very religious and chooses not to put certain things into his body. The Claimant says that he told his employer that their policy is discriminatory, coercive and punitive. The Claimant said that his employer refused any accommodations to him.

[23] The Claimant agreed that he knew that there was a vaccination policy. He agreed that he understood that he could be terminated as a result of the policy.

[24] The Claimant says that he told his employer that if they fired him that he would pursue a claim for wrongful dismissal. The Claimant also relies on his termination

¹¹ See GD3-28.

¹² See GD3-26.

¹³ See GD2-24.

¹⁴ See GD3-30.

letter¹⁵ which says that he was terminated on a without cause basis. The Tribunal is not bound by how the employer and employee characterize the end of the employment.¹⁶

Elements of misconduct?

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

[26] There is no dispute that the employer had a vaccination policy. The claimant knew about the vaccination policy. I find that the Claimant made his own choice not to get vaccinated. This means that the Claimant's choice to not get vaccinated was conscious, deliberate and intentional.

[27] The Claimant did not have a medical exemption. Without an exemption the Claimant's employer made it clear that an unvaccinated employee could face discipline, including termination of employment.¹⁷

[28] The employer's policy requires all employees to either have an exemption or get vaccinated. The Claimant did not get vaccinated and had no exemption. The policy also states that if an employee remains unvaccinated they must do rapid antigen testing. The Claimant refused. This means that he was not in compliance with his employer's policy. That means that he could not go to work to carry out her duties owed to his employer. This is misconduct.

[29] The Claimant agreed that he was aware that by not getting vaccinated (or having an exemption) that he could be terminated. This means that the Claimant knew there was real possibility that he could be let go for not following the policy.

[30] By not getting vaccinated or by not getting an exemption, the misconduct, led to the Claimant losing his employment.

¹⁵ See GD2-9.

¹⁶ See, for example, *Canada (Attorney General) v. Morris*, 1999 CanLII 7853 (FCA).

¹⁷ See GD3-30 Policy Non-Compliance.

[31] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Claimant knew there was a mandatory vaccination policy, and did not follow the policy or get an exemption for doing so. The Claimant knew that by not following the policy that he would not be permitted to be at work. This means that he could not carry out his duties to his employer. The Claimant was also aware that there was a real possibility that he could be let go for this reason.

Employment insurance benefits

[32] The Claimant also believes that because he has paid into employment insurance (EI) for years that he should be entitled to benefits. EI is an insurance plan and, like other insurance plans, you have to meet certain requirements to receive benefits. The EI system is to help workers who, for reasons beyond their control, find themselves unemployed and unable to find another job. I do not find that this applies in this situation.

So, did the Claimant lose his job because of misconduct?

[33] Based on my findings above, I find that the Claimant lost his job because of misconduct.

Conclusion

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

[35] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section