



Citation: *DM v Canada Employment Insurance Commission*, 2023 SST 257

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

Decision

Appellant: D. M.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (489691) dated June 30, 2022 (issued by Service Canada)

Tribunal member: Audrey Mitchell

Type of hearing: Teleconference

Hearing date: December 13, 2022

Hearing participant: Appellant

Decision date: January 5, 2023

File number: GE-22-2551

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 lost his job. The Claimant's employer says that he was let go because he went against its vaccination policy: he didn't say if he was 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 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?

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

¹ Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.

² See sections 30 and 31 of the Act.

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 went against his employer's vaccination policy.

[10] The Claimant says he refused to take the COVID-19 vaccine, so his employer fired him for non-compliance with its policy.

[11] The Commission says the Claimant didn't comply with his employer's COVID-19 vaccine when he refused to attest to his vaccination status. It concluded that this caused him to lose his job.

[12] The Claimant doesn't dispute the reason his employer dismissed him. Even though he thinks the employer violated his rights, I find that the Claimant lost his job because he went against his employer's COVID-19 vaccination policy.

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

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

[14] 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.

[15] Case law says that, to be misconduct, 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

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

[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.⁶

[17] 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

[18] 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 aren't 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.

[19] 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

[20] The Claimant says there was no misconduct because he didn't act in a wilful, negligent or careless way, nor did he act with wanton disregard. He argues that his employer acted in an unreasonable way.

[21] The Commission says there was misconduct because the Claimant knew that taking the COVID-19 vaccine was a condition of continued employment. It says he

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

⁶ See *Mishibinjima 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.

made a conscious and deliberate decision to refuse vaccination, and this led to his dismissal.

[22] I find that the Commission has proven that there was misconduct, because the Claimant knew that he could lose his job if he didn't comply with his employer's COVID-19 vaccine policy. But he chose not to take the vaccine even after his employer denied his request for accommodation.

[23] The Claimant's employer issued a COVID-19 vaccination policy with an effective date of September 7, 2021. The policy states that:

- all employees must get the COVID-19 vaccination,
- employees have to show proof of vaccinations,
- exceptions to the requirement to get the vaccine includes a valid medical reason and valid human rights grounds, and
- employees who go against the policy will be subject to progressive discipline up to and including unpaid leave and/or termination.

[24] The Claimant's employer sent an email on September 2, 2021, about its vaccination policy. The email includes the elements of the policy noted above. The Claimant confirmed at the hearing that he got this email.

[25] The Claimant asked his employer to exempt him from having to take the COVID-19 vaccine. The employer denied the Claimant's request. The Claimant testified that obviously, his employer didn't review his request. He says so because the employer's letter denying his request refers to human rights grounds. The Claimant says he asked for an exemption based on the *Charter of Rights and Freedoms* (Charter).

[26] The employer's letter to the Claimant denying his request for an exemption reminds the Claimant of the consequences of not complying with the COVID-19 vaccination policy.

[27] The employer sent the Claimant another letter dated October 1, 2021. The employer informed the Claimant that because he had not reported his vaccination status, he was in violation of its vaccination policy. The employer notified the Claimant that it was placing him on an unpaid leave of absence. The Claimant testified that he got this letter.

[28] The Claimant's employer sent him a letter dated October 18, 2021. The letter notes that the Claimant hadn't updated his vaccination status. The employer notified the Claimant that if he didn't comply with its policy by October 31, 2021, his employment would be terminated. The Claimant testified that he got this letter. He lost his job on November 1, 2021.

[29] I find from the Claimant's testimony that he knew about his employer's COVID-19 vaccination policy, and the deadlines and consequences of going against it. I find that the employer clearly laid out in its letters to him what was required and what would happen if he didn't report his vaccination status and when it would happen.

[30] The Claimant said of the employer's letters that they never responded to his request for exemption under the Charter. He testified that after he made his request under the Charter, the employer asked him to start taking COVID-19 tests and had also given him a website where he could upload test results. He says that as a result, he thought the employer had approved his exemption request.

[31] The Claimant sent his COVID-19 test history. It shows five test results from September 16 to October 1, 2021. The Claimant said that shortly after that, the employer disconnected his computer.

[32] I don't find the Claimant's testimony that he thought the employer approved his exemption request because of the testing is reasonable. The Claimant did identify the Charter in his request for an exemption. But the employer's policy provides for medical exemptions and valid exemptions under the provincial *Human Rights Code*. The employer decided that the Claimant's request did not meet the criteria under its policy.

[33] I understand that the Claimant doesn't agree with the employer's decision on his exemption request. I have no reason to doubt that the Claimant's employer asked him to upload COVID-19 test results. The first test result he sent the Commission was uploaded on September 16, 2021. But the employer's letter denying his exemption request is dated September 24, 2021. According to the Claimant's evidence, it was shortly after that that the employer disconnected his computer. So, I find it unlikely that the employer asking the Claimant to upload test results meant that it had approved his exemption request.

[34] The Claimant testified that there is nothing in his letter of offer of employment that says he has to be vaccinated. He said vaccination isn't part of his initial contract of employment, nor is it in his collective agreement. The Claimant argues that his employer breached the collective agreement because it unilaterally changed the terms of his contract.

[35] The COVID-19 vaccination policy the Claimant's employer implemented notes that it was done as required by Directive 6. In its September 2, 2021 memo, the employer says that under the province's Directive 6, it "is required to develop, implement, monitor and maintain a COVID-19 vaccination policy to ensure employees are vaccinated or tested regularly for COVID-19". Each of the letters the employer sent to the Claimant refer to the directive.

[36] The Claimant sent the Commission a copy of the province's Directive 6.¹¹ In it, the province's Chief Medical Officer of Health directs that hospitals require proof of full vaccination, medical exemption, completion of an educational session, or participation in an authorized COVID-19 vaccine clinical trial.

[37] The Claimant refers specifically to article 25 of his collective agreement. It deals with influenza vaccinations and refers to a recommendation from a Medical Officer of Health. It says that employees have the right to refuse any required vaccination.

¹¹ See GD3-60 to GD3-63.

[38] I don't accept the Claimant's argument that his employer breached his collective agreement and unilaterally changed the conditions of his employment. While his collective agreement speaks to the process related to the influenza vaccine based on a recommendation of the Medical Officer of Health, I find that the Claimant's employer was required by law to follow Directive 6 issued by the province's Chief Medical Officer of Health. The employer did so.

[39] The Claimant is right that Directive 6 did not require his employer to dismiss him. But I find that it was open to the employer to decide how it would ensure its employees complied with its COVID-19 vaccination policy. The employer sent the Claimant letters after communicating its policy to employees. The letters notified the Claimant of the consequences he would face if he went against the policy. But the Claimant chose not to submit his vaccination status to his employer.

[40] The Claimant said the health and safety measures his employer took during the pandemic were working. He said the employer could have continued doing what they had done before the vaccines were available. The Claimant also referred to a health condition that his employer knew about but didn't consider.

[41] I understand that the Claimant doesn't agree with his employer's requirement to take the COVID-19 vaccine or face dismissal. I don't doubt that he has a health condition and is concerned about how the vaccine would affect him if he took it. But I don't find that this means the Claimant didn't have to comply with the policy.

[42] I find that the Claimant's action, namely going against his employer's COVID-19 vaccination policy was wilful. He made a conscious, deliberate, and intentional choice not report his vaccination status. He did so knowing that his employer would likely fire him. For these reasons, I find that the Commission has proven that there was misconduct.

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

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

[44] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew that refusing to say if he was vaccinated was likely to cause him lose him job.

Conclusion

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

[46] This means that the appeal is dismissed.

Audrey Mitchell

Member, General Division – Employment Insurance Section