



Citation: *AA v Canada Employment Insurance Commission*, 2023 SST 329

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

Decision

Claimant: A. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (463115) dated March 21, 2022 (issued by Service Canada)

Tribunal member: Bret Edwards

Type of hearing: Videoconference

Hearing date: January 17, 2023

Hearing participant: Claimant

Decision date: January 23, 2023

File number: GE-22-3485

Decision

[1] The appeal is dismissed. I disagree 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 said that he was let go because he didn't follow their mandatory COVID-19 vaccination policy.

[4] Even though the Claimant doesn't dispute that this happened, he says that he shouldn't have been let go for this reason.

[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 lost

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.

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 didn't follow his employer's mandatory COVID-19 vaccination policy.

[10] The Claimant and the Commission agree on why the Claimant was let go from his job. The Claimant says that he was let go because he didn't follow his employer's COVID-19 vaccination policy.³ His employer also says that he was let go for this reason.⁴

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

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

[12] 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 suspension 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.

[13] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁵ Misconduct also includes conduct that is so reckless that it is almost wilful.⁶ 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.⁷

³ GD3-23.

⁴ GD3-32.

⁵ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁶ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁷ See *Attorney General of Canada v Secours*, A-352-94.

[14] 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.⁸

[15] The Commission has to prove that the Claimant was let go from 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 let go from his job because of misconduct.⁹

[16] The law doesn't say I have to consider how the employer behaved.¹⁰ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.¹¹

[17] 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.¹² I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[18] The Commission says that there was misconduct because the Claimant knew about his employer's mandatory COVID-19 vaccination policy and knew that he could be let go if he didn't follow their policy, but chose not to follow it anyway.¹³

[19] The Claimant says that there was no misconduct because his employer's policy wasn't part of his original work contract and it was unfair of his employer to let him go for not following their policy.¹⁴

⁸ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

⁹ See *Minister of Employment and Immigration v Bartone*, A-369-88.

¹⁰ See section 31 of the Act.

¹¹ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹² See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

¹³ GD4-3.

¹⁴ GD2-10.

[20] The Claimant's employer told the Commission that:¹⁵

- Their business was based on their employees visiting different customer sites (vendors) to do work.
- They brought in a mandatory COVID-19 vaccination policy because most of their major vendors had their own COVID-19 vaccination policies, which required employees on site to be vaccinated.
- Each of these vendors had sent employees who worked on site letters to say that they had to be vaccinated to continue working there.
- They wanted to keep their vendors happy, so they adopted a mandatory COVID-19 vaccination policy indirectly
- They just sent letters to employees to communicate the policy rather than create a policy memo or document from scratch.
- Their letters said that employees would be let go if they weren't vaccinated as it was now their (the employer's) requirement too.
- There were some vendors who didn't have a vaccination policy, but not enough to fill up a days work and accommodate all of the employees who weren't vaccinated.
- The Claimant didn't get vaccinated and didn't give a reason for it.
- The Claimant didn't request an exemption from their policy and they didn't discuss the possibility of an exemption with him.
- They gave the Claimant 30 days to find another job with a vendor who didn't have a vaccination policy or he would be let go.

[21] The Claimant told the Commission and testified that:¹⁶

- He knew about his employer's policy.

¹⁵ GD3-32.

¹⁶ GD3-23, GD3-29.

- His employer's policy required him to share his vaccination status, but he didn't do that.
- He didn't apply for an exemption from the policy because a co-worker applied for one and was denied, so he didn't bother trying to request one himself.
- He didn't commit misconduct because the policy wasn't part of his original work contract.
- It wasn't fair for his employer to let him go because they could have just given him work with vendors who didn't have a COVID-19 vaccination policy, but chose not to.
- After his employer told him he had 30 days to find another job with a vendor who didn't have a vaccination policy or would be let go, he applied for two jobs but didn't get either.
- He knew that he could be let go if he didn't follow his employer policy.

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

[23] I find the Claimant committed the actions that led to his dismissal, as he knew his employer had a mandatory COVID-19 vaccination policy and what he had to do to follow it.

[24] I further find the Claimant's actions were intentional as he made a conscious decision not to follow his employer's policy.

[25] There is clear evidence that the Claimant knew about his employer's policy. He said that he knew about it, as mentioned above.

[26] There is also clear evidence that the Claimant chose not to follow his employer's policy. He said that he didn't share his vaccination status with his employer as required. He also said he still chose not to follow his employer's policy even though he wasn't able to get another job with a vendor who didn't have a vaccination policy, as mentioned above.

[27] I acknowledge that the Claimant feels that he didn't commit misconduct because his employer's policy wasn't part of his original work contract.

[28] Unfortunately, I find that this argument isn't relevant here. As mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct. This means I need to focus on the Claimant's actions leading to his dismissal and whether he knew that his actions would lead to him being let go. If the Claimant wants to pursue this argument, he needs to do that through another forum.

[29] I also acknowledge that the Claimant feels that it was unfair of his employer to let him go because they could have just given him work with other vendors but chose not to.

[30] However, I find that this argument isn't relevant here either, unfortunately. Once again, as mentioned above, I can only look at the Claimant's actions in relation to what the law says about misconduct. If the Claimant wants to pursue this argument, he needs to do that through another forum too.

[31] Instead, I find that what is relevant is that the Claimant had two ways he could follow his employer's policy: provide proof that he had gotten the COVID-19 to keep his job or find another job with a vendor who didn't have a COVID-19 vaccination policy. He chose the second way, but when that didn't work out (he couldn't find another job), he didn't then go and provide proof of vaccination instead. This means that he didn't follow his employer's policy, one way or the other.

[32] So, while I acknowledge the Claimant's concerns about his employer's mandatory COVID-19 vaccination policy, I find that the evidence shows that he made a conscious decision not to follow the policy. He didn't share his vaccination status or find another job within the company as the policy required him to do, which shows that his actions were intentional.

[33] I also find the Claimant knew or should have known that not following his employer's mandatory COVID-19 vaccination policy could lead to him being let go.

[34] There is clear evidence that the Claimant knew he could be let go if he didn't follow his employer's policy. He said that he knew this, as mentioned above.

[35] There is also clear evidence from the Claimant's employer that they told the Claimant he could be let go if he didn't follow their policy. On December 13, 2021, they sent him a letter. The letter said the following:¹⁷

- He's not currently following the vaccination requirements of at least one of the customers whose worksite he might need to visit.
- One of his job duties is to visit customer sites and one of the customer sites he's responsible for has required that all visitors be vaccinated.
- He hasn't followed these requirements (full vaccination) and so can't perform an essential job function.
- He's been told before that he has to follow customer requirements to do his job.
- He has 30 days to follow these requirements (provide proof of full vaccination) or find another role within the company.

[36] I therefore find that the Claimant's conduct is misconduct under the law since he committed the conduct that led to his dismissal (he didn't follow his employer's mandatory COVID-19 vaccination policy), his actions were intentional, and he knew or ought to have known that his actions would lead to him being let go.

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

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

¹⁷ GD3-24.

Conclusion

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

[39] This means that the appeal is dismissed.

Bret Edwards

Member, General Division – Employment Insurance Section