



Citation: *AG v Canada Employment Insurance Commission*, 2022 SST 1715

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

Decision

Appellant: A. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (511086) dated July 25, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Videoconference

Hearing date: November 10, 2022

Hearing participant: Appellant

Decision date: November 14, 2022

File number: GE-22-2644

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 whether he had been 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.

[6] The Claimant says that the policy is illegal, discriminatory, and unfair. He says that vaccination wasn't a condition of his employment contract. He says his employer doesn't have a right to his personal medical information. He says that the policy violates a number of legal principles including: the Nuremberg Code, the *Canadian Charter of Rights and Freedoms*, privacy laws, human rights laws, and a patient's right to refuse treatment.

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

[7] The Claimant says that, as the vaccine has a risk of harm, other options should have been made available to him. He says he took other effective precautions, such as wearing protective equipment and rapid testing.

Issue

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

Analysis

[9] 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

[10] 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?

[11] I find that the Claimant lost his job because he went against his employer's vaccination policy.

[12] The Claimant doesn't dispute that this happened. The Claimant testified that he didn't give his employer information about whether or not he was vaccinated.

[13] The Commission says the Claimant was aware of the policy and understood that failure to comply would lead to his termination. It says there is a direct correlation between the Claimant's failure to meet the conditions of the employer's policy and the termination of his employment. It says the Claimant's refusal to comply with the policy was wilful and deliberate, and proves misconduct.

[14] I find that the Claimant lost his job because he went against his employer's vaccination policy.

² See sections 30 and 31 of the Act.

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

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

[16] 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.

[17] 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 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

[18] 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

[19] 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

[20] 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

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

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

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.

consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

[21] 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

[22] 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 and saying whether he has been vaccinated;
- The employer sent letters and emails to the Claimant several times to communicate what it expected; and,
- The Claimant knew or should have known what would happen if he didn't follow the policy.

[23] The Claimant says that there was no misconduct because the policy is illegal, discriminatory, and unfair. He says that vaccination wasn't a condition of his employment contract. He says his employer doesn't have a right to his personal medical information. He says that the policy violates a number of laws or legal principles. He says other options should have been made available to him, such as wearing protective equipment and rapid testing.

[24] The employer's vaccination policy was emailed to employees on January 26, 2022. The policy says:

- Employees must show proof that they have received at least two doses of a Health Canada approved COVID-19 vaccine by February 28, 2022;

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

- Employees can request accommodation, due to a medical or human rights reason; and,
- Employees who fail to comply with the policy may be disciplined up to and including termination.¹¹

[25] The Claimant testified that he didn't give his employer information about whether or not he was vaccinated. He says that he didn't want to disclose his medical information.

[26] The Claimant testified that he received the policy that was emailed to employees on January 26, 2022. He says he received another letter from the employer telling him that the deadline of February 28, 2022 was extended to March 18, 2022.

[27] The Claimant testified that he asked his employer to allow him to work alone on the nightshift, as an accommodation to the policy. He says that there are only 5 to 10 people in the building during the night. He says the building is large, so there is room to social distance. He says that there are other safety precautions available, including personal protective equipment.

[28] The Claimant says that his employer didn't allow his request for accommodation. He says that his employer asked him for more information, including a doctor's note. He says the employer only allowed medical and religious accommodation. He says the employer didn't accommodate of conscience.

[29] The employer wrote to the Claimant on March 18, 2022, stating that the Claimant hasn't complied with the policy. The employer gave the Claimant working notice, stating that he will be terminated at the end of the workday on May 13, 2022. The employer said it would allow the Claimant to extend the working notice if he shows proof of a first dose by May 13, 2022.¹²

¹¹ See GD3-35 to GD3-40.

¹² See GD2-2 to GD2-3.

[30] I find that the Commission has proven that there was misconduct because:

- The employer had a vaccination policy that said employees must show proof of vaccination or face termination;
- The employer clearly communicated to the Claimant about what it expected of its employees and the consequence for not complying with the policy, through written correspondence on January 26, 2022 and March 18, 2022. The employer extended the deadline for the Claimant to comply with the policy, along with extending his working notice should he receive a first dose; and,
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy.

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

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

[32] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew that refusing to get vaccinated or say whether he had been vaccinated was likely to cause him to lose his job.

Conclusion

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

[34] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section