



Citation: *AS v Canada Employment Insurance Commission*, 2022 SST 1733

**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 (508682) dated August 11, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Videoconference

Hearing date: December 22, 2022

Hearing participant: Appellant

Decision date: December 30, 2022

File number: GE-22-2974

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 disentitled from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job. The Claimant's employer says that he was suspended because he went against its vaccination policy: he didn't get 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 suspension. It decided that the Claimant lost his job because of misconduct. Because of this, the Commission decided that the Claimant is disentitled from receiving EI benefits.

[6] The Claimant says his actions weren't wilful because his request for religious accommodation should have been allowed by the employer. He says that not following the policy didn't prevent him from carrying out his duties. He says that the employer cannot make unilateral change to the collective agreement.

Issue

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

¹ Section 31 of the *Employment Insurance Act* (Act) says that claimants who lose their job because of misconduct are disentitled from receiving benefits.

Analysis

[8] 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

[9] 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?

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

[11] The Claimant doesn't dispute this happened.

[12] The Commission says the Claimant committed the conduct of refusing to comply with the employer's vaccination policy. It says that the refusal caused his unpaid leave or suspension for the period from March 15, 2022 to June 17, 2022.

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

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

[14] The reason for the Claimant's suspension is misconduct under the law.

[15] 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.

² See sections 30 and 31 of the Act.

[16] 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

[17] 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

[18] 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

[19] 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.

[20] 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

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

³ See *Mishibinijima 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 *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 had a policy requiring all employees to be vaccinated against COVID-19, unless accommodated;
- The employer communicated the policy requirements to employees and provided ample time and opportunity for employees to get vaccinated;
- The Claimant confirmed that he was aware of the policy and the consequence of not following the policy; and,
- The Claimant's exemption request was denied and he wilfully and consciously chose to not comply with the policy.

[22] The Claimant says that there was no misconduct because:

- His actions weren't wilful because his request for religious accommodation should have been allowed by the employer;
- Not following the policy didn't prevent him from carrying out his duties, as he was able to work from home; and,
- The employer cannot make unilateral change to his collective agreement.

[23] The employer's vaccination policy is dated October 25, 2021. It says that:

- Employees must be fully vaccinated against COVID-19;
- The employer will allow accommodation to the policy based on a certified medical contraindications, religion, or other prohibited ground of discrimination as per the *Canadian Human Rights Act*;
- The attestation deadline is November 30, 2021, or two weeks after the date an employee is told that their request for accommodation is denied; and,
- The consequence of not following the policy includes leave without pay.¹¹

¹¹ See GD2-98 to 111.

[24] The Claimant says that he didn't get the vaccine due to his religion.

[25] The Claimant says that he became aware that the employer would implement a policy around September 2021. He provided the Tribunal with a copy of a draft policy, the policy dated October 25, 2021, and other correspondence from the employer about the policy, including answers to frequently asked questions.

[26] The Claimant says that he submitted his request for religious accommodation December 1, 2021. He says that his request was denied by the employer on February 14, 2022. The Claimant says he was told by the employer that, if he didn't get the vaccine within the next month, he would be placed on leave.

[27] The Claimant was suspended as of March 15, 2022.

[28] The Claimant says that the policy was changed and he returned to work on June 20, 2022.

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

- The employer had a vaccination policy that said all employees must be vaccinated, including those who can work from home;
- The employer sent documentation about the policy to the Claimant several times to communicate what it expected;
- The employer clearly told the Claimant his request for accommodation was denied, and informed him about what it expected of him in terms of getting vaccinated; and,
- The Claimant knew or should have known the consequence of not following the employer's vaccination policy.

[30] The Claimant relies on another decision of this Tribunal, which held that a party to a collective agreement can't unilaterally impose new conditions without consultation

and acceptance of the other party, exception when legislated.¹² I'm not bound by other Tribunal decisions and will not follow it. This is because the question of whether an employer can make unilateral change to the Claimant's collective agreement isn't for me to decide. Instead, the Claimant can file a grievance, which the Claimant says he has done with the help of his union.

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 suspension. He acted deliberately. He knew that refusing to get 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 disentitled from receiving EI benefits.

[34] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section

¹² This decision of the Tribunal's General Division (Employment Insurance) was released on December 14, 2022. I will refer to it as *AL v Canada Employment Insurance Commission*, as it isn't published.