



Citation: *LJ v Canada Employment Insurance Commission*, 2022 SST 1674

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

Decision

Appellant: L. J.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (493383) dated June 17, 2022
(issued by Service Canada)

Tribunal member: Kristen Thompson
Type of hearing: Teleconference
Hearing date: December 8, 2022
Hearing participant: Appellant
Decision date: December 12, 2022
File number: GE-22-2433

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 get vaccinated.

[4] 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.

[5] The Claimant says that going against his employer's vaccination policy isn't misconduct. He says he didn't receive any warnings from his employer and wasn't told he would be dismissed. He says he was told that, at worst, he would be moved to another location if he didn't get vaccinated. He says that there are other reasons for his dismissal, including that the employer is corrupt.

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

¹ Section 30 of the *Employment Insurance Act* (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.

[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 went against his employer's vaccination policy.

[10] The Claimant says that the employer used the vaccination policy to dismiss him as a cover. He says that he was dismissed because the employer is corrupt. He says that when he was hired to replace another employee, he was trained while the other employee was still on the job. He says that the other employee didn't have knowledge that he would be fired, until the day the Claimant took over the other employee's shift.

[11] The Claimant says that the employer is lying when it says that he was dismissed because of the vaccination policy. He says that, according to communications with the employer, he should have been suspended on December 10, 2021, for not following the vaccination policy. Instead, he wasn't suspended until December 17, 2021, the day another employee started working as his replacement.

[12] The Claimant says that the employer discriminated against its employees based on race. He says that the company's goal was to replace him with someone who didn't look like the Claimant.

[13] The Commission says that the Claimant was dismissed because he refused to comply with the employer's mandatory vaccination policy. It says that evidence supports that the employer undertook a vaccination policy, the policy was communicated to employees, and the policy clearly said that failure to comply would result in disciplinary action, including termination.

[14] The employer issued the Claimant's Record of Employment on January 20, 2022. The Record said that the Claimant's last day of work was December 17, 2021. It

said that the reason for issuing was that the Claimant was placed on a leave of absence.³

[15] The employer sent a letter to the Claimant, dated November 26, 2021. The letter said that if the Claimant doesn't inform the employer that he is fully vaccinated by December 9, 2021, he will be placed on an unpaid leave of absence effective December 10, 2021.⁴

[16] The employer spoke to the EI Commission on June 7, 2022. The employer said that the Claimant was dismissed because he didn't following the mandatory vaccination policy.⁵

[17] I find that the Claimant lost his job because he went against his employer's vaccination policy. I prefer the written evidence of the employer, as it clearly and consistently said the reason for the Claimant's dismissal. This is also what the employer told the Commission. The Claimant didn't provide enough detail to show that he was dismissed for other reasons. Although the employer delayed putting the Claimant on a leave of absence, it doesn't change the reason why: the Claimant didn't follow the employer's vaccination policy.

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

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

[19] 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.

³ See GD3-18.

⁴ See GD3-24.

⁵ See GD3-36.

[20] Case law says that, to be misconduct, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.⁶ Misconduct also includes conduct that is so reckless that it is almost wilful.⁷ 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.⁸

[21] 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.⁹

[22] 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

[23] 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.

[24] 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.¹³

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

⁷ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁸ See *Attorney General of Canada v Secours*, A-352-94.

⁹ See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

¹⁰ See section 30 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 See *Minister of Employment and Immigration v Bartone*, A-369-88.

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

- The employer had a vaccination policy;
- The employer notified the Claimant about its expectations about getting vaccinated, and the policy clearly laid out that failure to comply would result in disciplinary action, including termination;
- The employer sent letters 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.

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

- He didn't receive any warnings from his employer;
- He wasn't told he would be dismissed if he didn't follow the policy; and,
- He was told by his supervisor(s) that, at worst, he would be moved to another location if he didn't get vaccinated.

[27] The employer's vaccination policy says that:

- All staff must be fully vaccinated against COVID-19 by October 31, 2021;
- Exemptions to the policy are allowed on case-by-case basis, for medical, creed, or religious reasons;
- Employees with an approved exemption from being vaccinated may be accommodated to the point of undue hardship. These staff members may need to be placed at a different location, or following other rules; and,

- Employees who don't follow the policy may be subject to disciplinary action, including termination.¹⁴

[28] The employer sent out an email to employees on October 29, 2021. It said that the employer is granting an extension of time for employees to follow the policy, until December 10, 2021. The email was written by the employer's Vice President of Human Resources and Locating.¹⁵

[29] The employer sent a letter to employees on November 26, 2021. It said that if employees don't inform the employer that they are fully vaccinated by December 9, 2021, they will be placed on an unpaid leave of absence effective December 10, 2021.¹⁶

[30] The employer sent a letter to the Claimant on June 7, 2022. It said that the maximum length of time allowed for a leave of absence is four months, which has now expired. It said that he is terminated for cause, effective immediately, for not following the vaccination policy.¹⁷

[31] The Claimant testified that he didn't get vaccinated. He didn't say he had an exemption to the policy. He says that everyone knew how he felt about the vaccine.

[32] The Claimant testified that he received a copy of the policy. He says he received the email and letters from the employer, dated October 29, 2021, November 26, 2021, and June 7, 2022.

[33] The Claimant says that he wasn't put on an unpaid leave of absence, instead he was dismissed on December 17, 2021. He says that this proves that the employer was lying.

¹⁴ See GD3-25 to 29.

¹⁵ See GD3-22 to 23.

¹⁶ See GD3-24.

¹⁷ See GD3-37.

[34] The Claimant says that he was told by his supervisor(s) that he didn't have to get vaccinated. He says he was told that, if he wasn't vaccinated, he could work at another location.

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

- The employer had a vaccination policy that said all staff are required to be fully vaccinated;
- The employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated. The Claimant testified that he received a copy of the policy;
- The employer sent letters to the Claimant several times to communicate what it expected. The Claimant testified that he received correspondence from the employer about the policy dated, October 29, 2021, and November 26, 2021. As such, I find that the Claimant did receive warnings about the policy and its consequences;
- I prefer the written correspondence of the employer over the testimony of the Claimant, as it is consistent, clear, and reflects the written policy. The Claimant testified that he was told by his supervisor that, if he wasn't vaccinated, he could work at another location. However, the written correspondence of the employer doesn't indicate that the Claimant would be allowed to work at another location. It would have been prudent for the Claimant to discuss any discrepancies, between the correspondence of the employer and the verbal remarks of his supervisor, with the upper manager who sent out the correspondence; 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?

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

[37] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew or should have known that refusing to get vaccinated was likely to cause him to lose his job.

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.

Kristen Thompson
Member, General Division – Employment Insurance Section