



Citation: *DA v Canada Employment Insurance Commission*, 2022 SST 1740

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

Decision

Appellant: D. A.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (473354) dated June 1, 2022 (issued by Service Canada)

Tribunal member: Elizabeth Usprich

Type of hearing: Videoconference

Hearing date: November 8, 2022

Hearing participant: D. A.
Appellant

Decision date: November 14, 2022

File number: GE-22-2218

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, D.A., worked as a senior storeperson and he lost his job. The Claimant's employer says that he was let go because he went against its vaccination policy: he did not get vaccinated and was not granted an exemption.

[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.

Matters I have to consider first

Additional documents

[6] The Claimant said at the hearing that he had emailed in documents the day before the hearing. I confirmed that they were not uploaded prior to the hearing. I asked the Claimant what was contained in the documents and he said that there was a labour arbitration decision which he felt was similar to his case, documentation from an airline that allowed his religious exemption, and an award received by him from his employer approximately six months after dismissal.

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] In actuality, there were also arguments that the Claimant did not put forward at the hearing.

[8] The Commission had no additional arguments. The Claimant's email is accepted and coded as GD8.

[9] At the hearing, the Claimant read from his exemption request email and the response received by his employer. The Claimant was asked to submit these after the hearing which he did. The email thread is accepted and coded as GD10. This same document also said that there was an attachment of the termination letter that he received. No letter was attached.

[10] The Claimant also submitted a document that was dated November 8, 2022. This is a corporate communication from the employer that says that they will be making a formal announcement about employees that were terminated for non-compliance with their vaccination policy. This was coded as GD9. However, I do not find that this is relevant as I must only decide whether the Claimant qualifies for benefits under the EI Act.

Issue

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

Analysis

[12] 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

[13] 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.

² See sections 30 and 31 of the Act.

Why did the Claimant lose his job?

[14] I accept that the Claimant lost his job because he did not follow his employer's mandatory vaccination policy. That was the reason that the Claimant's employer provided to the Commission. The Claimant agrees that he was let go because he did not follow his employer's vaccination policy. The Claimant does not feel it is misconduct for not following the policy. The Claimant did not believe that his employer would actually end their 20 year employment relationship. The Claimant feels that it was discriminatory for his employer to not grant him a religious accommodation. The Claimant feels he should be entitled to benefits.

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

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.

[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 cannot 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 are not 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.

[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 the employer had a vaccination policy. It also says the employer clearly communicated with the Claimant about its expectations about vaccination. The employer sent emails to the Claimant to communicate what it expected. So, the Claimant knew or ought to have known the consequences of not complying with the policy. The Commission says that the Claimant was aware of the policy and that there was misconduct because the Claimant knew there was a mandatory vaccination policy and made the choice not to get vaccinated.

[23] The Claimant says that there was no misconduct because the employer's vaccination policy was unfair and went against his religious beliefs. The Claimant also says that there was no misconduct because he could have performed his duties if the employer allowed him to be at work. The Claimant also feels that his employer went against his human rights by refusing a religious exemption. The Claimant says that he

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.

does not feel that his employer's policy was reasonable and thinks it went against his collective agreement.

[24] The Claimant does not dispute that his employer had a vaccination policy and that he was aware of it.

[25] The employer's vaccination policy was introduced on September 7, 2021. On October 15, 2021 the employer updated the policy to extend the deadline for employees to receive two doses of an "acceptable COVID-19 vaccine by end of day November 20, 2021."¹¹ The policy also includes a process for an accommodation or medical exemption.¹²

[26] A reminder notice email was sent to all employees on November 17, 2021.¹³ The reminder notice included information that there was a cybersecurity incident and any email accommodation requests or proof of vaccination submitted during October 29, 2021 to November 7, 2021 would need to be re-sent.

[27] The policy says that a failure to get vaccinated by December 31, 2021 will result in employment being terminated.¹⁴ The policy says that the requirement to be vaccinated does not apply to those employees with an approved Ontario Human Rights Code accommodation or medical exemption.¹⁵

[28] The Claimant says that he chose not to get vaccinated because he felt that it was against his religious beliefs.

[29] The Claimant testified that he submitted a requested for an accommodation on October 29, 2021 but had to re-send on November 8, 2021¹⁶ due to a cybersecurity incident. The Claimant says that the employer refused his accommodation request on

¹¹ See GD3-34.

¹² See GD3-33.

¹³ See GD3-32.

¹⁴ See GD3-33.

¹⁵ See GD3-33.

¹⁶ See GD10-5.

religious grounds. The Claimant read the email denial letter that he received from his employer dated November 12, 2021.¹⁷

[30] The Claimant says that he did not believe that the employer would terminate his employment over not being vaccinated. The Claimant testified that after he received his employer's denial of accommodation letter he did not take any further steps with his employer. The Claimant says that he was not aware of any way to appeal the employer's decision on the accommodation request.

[31] In his written submission, the Claimant acknowledges that he read his employer's policy.¹⁸ The Claimant further states that he believed he would be accommodated for his religious beliefs.

[32] The Claimant says that he believed that his union would step in and do something about the situation. The Claimant says that he did not believe that the employer could put him on an unpaid leave of absence because the collective agreement did not allow for that. The Claimant also says that he did not think that the employer would end his employment over not being vaccinated. Yet, the Claimant says he did understand there was a mandatory vaccination policy and that the policy said that he could be terminated for non-compliance.

[33] The Claimant says that he feels that the employer has no right to deny his religious accommodation. The Claimant says that the employer has other policies in place that they do not follow. The Claimant says this led him to believe that they would not terminate his employment.

Medical or other exemption

[34] The Claimant was aware that his employer required that if he did not get vaccinated he had to get an exemption to remain employed.¹⁹ The Claimant submitted a

¹⁷ See GD10-11.

¹⁸ See GD8-2.

¹⁹ See GD3-33 and GD3-34.

request for a religious based exemption to his employer.²⁰ The Claimant says that the employer refused his request by email.²¹

[35] The Claimant provided testimony about his genuinely held religious belief about vaccinations. I accept that the Claimant is refusing to have the COVID-19 vaccine due to his religious beliefs.

Elements of misconduct?

[36] I find that the Commission has proven that there was misconduct for the reasons that follow.

[37] There is no dispute that the employer had a vaccination policy. The claimant knew about the vaccination policy. I accept that the Claimant chose to put his religious beliefs first. I find that the Claimant made his own choice not to get vaccinated. This means that the Claimant's choice to not get vaccinated was conscious, deliberate and intentional.

[38] The Claimant did not have a religious or medical exemption. Without an exemption the Claimant's employer made it clear that an unvaccinated employee would face discipline, including termination of employment.²²

[39] Additionally, an airline accepting the Claimant's religious exemption is also not binding.²³ Again, I have to focus on the Act only. I cannot 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 are not for me to decide.²⁴ I can consider only one thing: whether what the Claimant did or failed to do is misconduct under the Act.

²⁰ See GD10-5 to GD10-9.

²¹ See GD10-11.

²² See GD3-33.

²³ See GD8-5 to GD8-8.

²⁴ See *Canada (Attorney General) v McNamara*, 2007 FCA 107.

[40] The employer's policy requires all employees to either have an exemption or get vaccinated. The Claimant did not get vaccinated and had no exemption. This means that he was not in compliance with his employer's policy. That means that he could not go to work to carry out his duties owed to his employer. This is misconduct.

[41] The Claimant testified that he did not believe that he would lose his job over not getting a vaccination. Yet, the Claimant does not dispute that in all of the employer's communication it clearly stated that a failure to be vaccinated (or have an exemption) would result in termination of employment. The Claimant argued that the employer did not always follow their own policies. Again, the law doesn't say I have to consider how the employer behaved.²⁵ Instead, I have to focus on what the Claimant did or failed to do and whether that amounts to misconduct under the Act.²⁶ I find that the Claimant knew, or ought to have known, that termination was a real possibility. My finding is based on the undisputed email communications that the employer had with the Claimant.²⁷ The Claimant also said that he did not believe that the employer could place him on an unpaid leave. Once the Claimant was placed on an unpaid leave of absence it should have been clear that the employer was enforcing its policy. At a minimum, at that point, the Claimant should have been aware that there was a real possibility that he could be let go for not following the policy.

[42] By not getting vaccinated or by not getting an exemption, the misconduct, led to the Claimant losing his employment.

[43] I find that the Commission has proven, on a balance of probabilities, that there was misconduct because the Claimant knew there was a mandatory vaccination policy, and did not follow the policy or get an exemption for doing so. The Claimant knew that by not following the policy that he would not be permitted to be at work. This means that he could not carry out his duties to his employer. The Claimant knew, or ought to have known, that there was a real possibility that he could be let go for this reason.

²⁵ See section 30 of the Act.

²⁶ See *Paradis v Canada (Attorney General)*, 2016 FC 1282; *Canada (Attorney General) v McNamara*, 2007 FCA 107.

²⁷ See, for example, GD3-33 about termination of employment and GD3-35 about an unpaid leave.

[44] The Claimant says that his employer violated the collective agreement by implementing a policy unilaterally. This is something best left to a labour board or tribunal. The Supreme Court of Canada has issued a decision addressing whether a workplace safety policy is reasonable and what must be considered in making that decision.²⁸ However, that is in a labour arbitration context. I am not a labour board arbitrator and the Claimant would have to make his arguments about the collective agreement and its potential violation to another body. Further, I am not bound by the labour arbitration case that the Claimant submitted.²⁹

Employment insurance benefits

[45] The Claimant also believes that because he has paid into employment insurance (EI) for years that he should be entitled to benefits. EI is an insurance plan and, like other insurance plans, you have to meet certain requirements to receive benefits. The EI system is to help workers who, for reasons beyond their control, find themselves unemployed and unable to find another job. I do not find that this applies in this situation.³⁰

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

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

²⁸ See *Communications, Energy, and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd.* [2013] 2 SCR 458.

²⁹ See GD8-11 to GD8-48.

³⁰ See *Pannu v Canada (Attorney General)*, 2004 FCA 90, at paragraph 3.

Conclusion

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

[48] This means that the appeal is dismissed.

Elizabeth Usprich
Member, General Division – Employment Insurance Section