



Citation: *GS v Canada Employment Insurance Commission*, 2023 SST 532

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

Decision

Appellant (Claimant): G. S.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (497838) dated July 21, 2022 (issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: Teleconference
Hearing date: January 24, 2023
Hearing participant: Appellant
Decision date: January 25, 2023
File number: GE-22-3109

Decision

[1] The appeal is dismissed.

[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 the Claimant is disqualified from receiving Employment Insurance (EI) benefits from January 2, 2022.¹

Overview

[3] The Claimant worked as a Generator Technician and lost his job on October 6, 2021. The Claimant's employer ("X") said the Claimant was let go because he refused to be vaccinated so he could work on customer worksites.

[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 the Claimant was disqualified from receiving EI benefits from January 2, 2022.

[5] The Commission says the Claimant's refusal to comply with the employer's customers' mandatory vaccination policies was misconduct. The Commission further says the Claimant was aware of the employer's customers' vaccination policies and understood that failing to comply would lead to his termination of employment.

[6] The Claimant says that choosing not to be vaccinated wasn't misconduct. He further says the employer's customers' vaccination policies violated his rights and was discriminatory.

Issue

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

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

Analysis

[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 the Claimant lost his job because he refused to comply with the employer's customers' mandatory vaccination policies.

[10] The Commission says the reason the employer gave is the reason for the dismissal. The employer told the Commission that the Claimant refused to comply with their customers' mandatory vaccination policies.

[11] The Claimant doesn't dispute that he was dismissed for failing to comply with the employer's customers' mandatory vaccination policies. However, he says the vaccination policies were discriminatory.

[12] I find the Claimant lost his job because he refused to comply with the employer's customers' mandatory vaccination policies.

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

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

[14] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.² Misconduct also includes conduct that is so reckless that it is almost wilful.³ 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.⁴

² See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

³ See *McKay-Eden v Her Majesty the Queen*, A-402-96.

⁴ See *Attorney General of Canada v Secours*, A-352-94.

[15] 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.⁵

[16] 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.⁶

[17] The Commission says there was misconduct because the Claimant aware of the employer's customers' vaccination policies and understood that failing to comply would lead to his termination of employment.

[18] The Claimant says that there was no misconduct because choosing not to be vaccinated wasn't misconduct.

[19] I find the Commission has proven there was misconduct, because they showed the Claimant was **aware** that refusing to be vaccinated would lead to his dismissal by the employer (GD3-20 and GD3-23). Furthermore, the Commission provided statements from the employer that the Claimant was advised he would lose his job if he refused to be vaccinated (GD3-22). I realize the Claimant argued that choosing not to be vaccinated wasn't misconduct. However, I must apply the legal test for misconduct as defined in the **case law** (listed above). On this matter, I must apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.⁷

Additional Testimony from the Claimant

[20] The Claimant further testified that the vaccination requirement from the employer's customers was discriminatory and violated his rights. Nevertheless, the matter of determining whether the employer's customers' vaccination policies were fair

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

⁶ See *Minister of Employment and Immigration v Bartone*, A-369-88.

⁷ *Knee v Canada (Attorney General)*, 2011 FCA 301.

or reasonable wasn't within my jurisdiction. In short, other avenues existed for Claimant to make these arguments.⁸

[21] Finally, the Claimant argued that he had paid into Employment Insurance and should be entitled to benefits. I realize the Claimant was frustrated and unhappy about this matter. However, the only issue before me was whether the Claimant lost his job because of misconduct. As mentioned, I must apply the law on this issue. In other words, I cannot ignore the law even in the most sympathetic cases.⁹

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

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

Conclusion

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

[24] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section

⁸ *Paradis v Canada (Attorney General)*, 2016 FC 1281.

⁹ *Knee v Canada (Attorney General)*, 2011 FCA 301