



Citation: *TV v Canada Employment Insurance Commission*, 2023 SST 630

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

Decision

Appellant: T. V.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (511012) dated August 14, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson

Type of hearing: Teleconference

Hearing date: February 9, 2023

Hearing participant: Appellant

Decision date: February 10, 2023

File number: GE-22-3056

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 follow the testing rules and 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 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 vaccine is unsafe. He says that the policy is unwarranted. He says that the policy is against several laws and legal principles.

Issue

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

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

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.

[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 lost his job because he went against his employer's vaccination policy.

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

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

[14] The reason for the Claimant's dismissal 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 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.

[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

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

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

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:

- the employer had a vaccination policy
- the policy was communicated to employees

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 Claimant was informed about the consequences of not following the policy
- the policy was reasonable within the workplace context, as the Claimant was employed in the healthcare industry

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

- the vaccine is unsafe and ineffective, referencing adverse events reports and death reports¹¹
- the policy is unwarranted
- the policy is against several laws and legal principles, including human rights laws, the Nuremberg Code, the *Canadian Charter of Rights and Freedoms*, the *Criminal Code*, the *Crimes Against Humanity and War Crimes Act*, employment law, and informed consent

[23] The employer's vaccination policy says:

- as of November 4, 2021, employees must show proof of full vaccination against COVID-19
- prior to this deadline, employees who aren't fully vaccinated must perform regular antigen testing starting September 7, 2021
- employees that don't follow the policy will be put on an unpaid leave of absence, and may be dismissed as of January 17, 2022
- the policy is aligned to Directive 6, issued by the Chief Medical Officer of Health¹²

[24] The Claimant testified that he refused nasal swab COVID-19 testing. He says he was suspended from his job on September 16, 2021, for refusing these tests.

¹¹ See GD2-12 to 23.

¹² See GD3-37 to 46.

[25] The Claimant testified that he didn't get vaccinated. He says that his employer was unable to provide him with long-term safety data regarding the vaccine. He says that the pharmaceutical industry doesn't have a good reputation.

[26] The Claimant says that he didn't speak with his family doctor about his concerns regarding vaccine safety.

[27] The Claimant says that, while he was on leave, his employer mailed him an updated policy. He says that the employer delayed the final deadline to show proof of full vaccination from November 4, 2021, to mid-November 2021.

[28] The Claimant says that he had online meetings with his employer in October 2021 and January 2022. He says that the purpose of the meetings was to determine if he will follow the vaccination policy.

[29] The Claimant testified that he understood the consequences of not following the policy – suspension and dismissal. He says he was dismissed on January 17, 2022.

[30] The Claimant says that he filed a grievance against his employer.

[31] 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 full vaccination against COVID-19 and, prior to the deadline, employees who aren't vaccinated must undergo testing
- the employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated and the testing rules
- the employer sent the updated policy to the Claimant, and spoke with him several times, to communicate what it expected
- 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?

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

[33] This is because the Claimant's actions led to his dismissal. He acted deliberately. He knew that refusing to follow the testing rules and get vaccinated was likely to cause him to lose his job.

Conclusion

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

[35] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section