



Citation: *CP v Canada Employment Insurance Commission*, 2023 SST 1050

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

Decision

Appellant: C. P.
Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission reconsideration decision (514990) dated August 18, 2022 (issued by Service Canada)

Tribunal member: Kristen Thompson
Type of hearing: Videoconference
Hearing date: January 19, 2023
Hearing participant: Appellant
Decision date: January 23, 2023
File number: GE-22-3082

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] 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 he was hired less than three months before the employer established the vaccination policy. He says that conditions of his employment, including vaccination, should have been given to him at this time.

[7] The Claimant says he didn't take the vaccine due to health concerns. He says that the employer should have allowed alternatives to the vaccine, such as working from home and testing. He says that policy isn't reasonable. He says that misconduct should be based on behaviour, not personal health information.

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

Issue

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

Analysis

[9] 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

[10] 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?

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

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

[13] The Commission says that the Claimant lost his job because he went against his employer's vaccination policy.

[14] 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 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

² See sections 30 and 31 of the Act.

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

[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 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.

[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

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.

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 there was misconduct because:

- the employer had a vaccination policy
- the employer clearly communicated the policy to the Claimant
- the Claimant knew or should have known what would happen if he didn't follow the policy

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

- he was hired less than three months before the employer established the vaccination policy, and this condition of his employment should have been given to him at the beginning of his employment contract
- the employer should have allowed alternatives to the vaccine, such as working from home and testing
- the policy isn't reasonable
- misconduct should be based on behaviour, not personal health information

[24] The employer's vaccination policy is dated September 20, 2021. It says that:

- employees are required to be fully vaccinated against COVID-19 by October 1, 2021, to attend at the office
- as of January 1, 2022, full vaccination is a condition of employment
- the employer will consider an exemption to the policy based on medical, creed, and religious grounds¹¹

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

¹¹ See GD3-38 to 39.

[25] The Claimant says he was hired by the employer to start June 1, 2021. He says that the conditions of his employment didn't require vaccination, although the vaccine was available. He says that his employer didn't mention vaccination when he was hired. He provided a draft copy of his employment contract. The contract didn't say that that vaccination is a condition of employment.¹²

[26] The Claimant says that he first heard about a potential vaccination policy in August 2021.

[27] The Claimant says that he received a copy of the policy upon implementation, around September 20, 2021.

[28] The Claimant says he has a family history of disease, including an autoimmune disorder that causes blood clotting. He says he spoke with a couple of doctors about getting an exemption to the policy. However, he says he was unable to get a written medical exemption.

[29] The Claimant says that he spoke with his employer about his medical concerns. He says that the employer had a specialist on hand the Claimant could speak with about vaccination. He says that the specialist couldn't put his mind at ease and wasn't knowledgeable about his medical concerns.

[30] The Claimant says that his employer told him that he wasn't exempted from the policy, based on medical grounds.

[31] The Claimant says that he understood that he could be terminated for not following the policy.

[32] The employer provided written notice to the Claimant about the policy and its consequences on October 27, 2021. The notice says that, as of January 1, 2022, full vaccination will become a condition of employment, subject to the exceptions. It says

¹² See GD6-2 to 6. Further documents provided by the Claimant indicate that this employment contract, dated May 13, 2021, was update on May 17, 2021, see GD6-9.

that the Claimant will be terminated effective December 31, 2021, unless he becomes fully vaccinated and provides proof of vaccination by that date.¹³

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

- the employer had a vaccination policy that said that employees are required to be vaccinated as condition to employment, unless an exemption is provided by the employer
- the employer clearly told the Claimant about what it expected of its employees in terms of getting vaccinated, even though the policy was implemented shortly after the Claimant was hired
- the employer didn't exempt the Claimant from the policy
- the employer sent the policy and other written correspondence to the Claimant 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?

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

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

¹³ See GD6-7 to 9.

Conclusion

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

[37] This means that the appeal is dismissed.

Kristen Thompson
Member, General Division – Employment Insurance Section