



Citation: *AM v Canada Employment Insurance Commission*, 2023 SST 1240

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

Decision

Appellant (Claimant): A. M.
Respondent (Commission): Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (494303) dated July 19, 2022
(issued by Service Canada)

Tribunal member: Gerry McCarthy
Type of hearing: In person
Hearing date: December 15, 2022
Hearing participant: Appellant
Decision date: January 3, 2023
File number: GE-22-2760

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 Fire Prevention Inspector and was placed on an unpaid leave of absence on November 11, 2021. The Claimant was then dismissed from his job on January 1, 2022. The Claimant's employer ("X") said the Claimant was placed on an unpaid leave of absence and then let go because he didn't comply with their mandatory vaccination policy.

[4] The Commission accepted the employer's reason for placing the Claimant on an unpaid leave of absence and then letting him go. It decided 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 action was conscious, willful, and deliberate and he ought to have known that failing to comply with the employer's vaccination policy would result in his dismissal.

[6] The Claimant says his actions weren't illegal and didn't reflect misconduct. He further says the employer's vaccination policy violated the collective agreement.

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

Matters I have to consider first

Post-Hearing Documents

[7] The Claimant submitted post-hearing documents. I accepted these documents, and they were listed in the Appeal Record as GD8 and GD9.

[8] The Commission submitted post-hearing submissions in response to the Claimant's post-hearing documents. The Commission's post-hearing submissions were automatically shared with the Claimant. I accepted the post-hearing submissions and they've been listed as GD10 in the Appeal Record.

Issue

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

Analysis

[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 the Claimant lost his job because he didn't comply with the employer's mandatory vaccination policy.

[12] The Commission says the reason the employer gave is the reason for the Claimant's dismissal. The employer told the Commission that the Claimant was dismissed because he didn't comply with their mandatory vaccination policy.

[13] The Claimant says the employer's vaccination policy violated his collective agreement.

[14] I find the Claimant lost his job because he didn't comply with the employer's mandatory 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] 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

[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.⁵

[18] 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

[19] The Commission says there was misconduct because the Claimant's action was conscious, willful and deliberate and he ought to have known that failing to comply with the employer's vaccination policy would result in his dismissal.

[20] The Claimant says there was no misconduct because he didn't do anything illegal that reflected misconduct.

[21] I find the Commission has proven there was misconduct, because they showed the Claimant was aware he could be dismissed for not complying with the employer's vaccination policy (GD3-20 and GD3-44). Furthermore, the Commission provided details from the employer on the deadlines that employees needed to be vaccinated (GD3-19). I realize the Claimant argued that he didn't do anything illegal that reflected

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.

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

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

misconduct. However, I must apply the legal test for misconduct as established in the case law. In short, the Commission has shown the Claimant was **aware** of the consequences for failing to comply with the employer's vaccination policy.

Additional Testimony and Submissions from the Claimant

[22] I realize the Claimant testified that he signed a settlement with the employer on November 18, 2022, and his Record of Employment was amended as a non-disciplinary suspension without pay. The Claimant also submitted information on his settlement with the employer in post-hearing documents. Nevertheless, the only issue before me was whether the Claimant lost his job on January 1, 2022, because of misconduct. On this matter, I must apply the law. In other words, I cannot ignore the law even in the most sympathetic cases.⁷

[23] I further recognize the Claimant testified that the employer violated his collective agreement with their vaccination policy. However, the matter of determining whether the employer's policy was fair or reasonable wasn't within my jurisdiction. Other avenues existed for Claimant to make these arguments.⁸

[24] Finally, the Claimant testified that the employer didn't respond to his questions about the risks and benefits of the vaccine. I realize the Claimant frustrated, disappointed and displeased about this matter. However, the matter of determining the effectiveness of the Covid-19 vaccine was beyond my jurisdiction. As mentioned, the only issue before me was whether the Claimant lost his job on January 1, 2022, because of misconduct.

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

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

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

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

Conclusion

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

[27] This means the appeal is dismissed.

Gerry McCarthy

Member, General Division – Employment Insurance Section