



Citation: *CG v Canada Employment Insurance Commission*, 2022 SST 356

Social Security Tribunal of Canada General Division – Employment Insurance Section

Decision

Appellant: C. G.

Respondent: Canada Employment Insurance Commission

Decision under appeal: Canada Employment Insurance Commission
reconsideration decision (446567) dated February 8, 2022
(issued by Service Canada)

Tribunal member: Paul Dusome

Type of hearing: Teleconference

Hearing date: April 6, 2022

Hearing participant: Appellant

Decision date: April 21, 2022

File number: GE-22-786

Decision

[1] The appeal is allowed. The Tribunal agrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) hasn't 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 isn't disqualified from receiving Employment Insurance (EI) benefits.¹

Overview

[3] The Claimant lost his job. The Claimant's employer said that he was let go because he refused to disclose his vaccination status, as required by the employer's new COVID-19 vaccination policy (Policy).

[4] The Claimant doesn't dispute that this happened. He said that the Policy was impossible to meet given the short time frame to be fully vaccinated. The late notice to him of the Policy gave him less time to comply. The employer did not have the right to know his vaccination status. He was not aware of dismissal as a consequence of non-compliance. He was wrongfully dismissed. The Commission assumed that the Policy was reasonable when it was not.

[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.

Issue

[6] 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

[7] 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?

[8] I find that the Claimant lost his job because he did not disclose his vaccination status. The Claimant did not dispute this. I see no evidence to contradict this, so accept that was the reason for his dismissal.

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

[9] The reason for the Claimant's dismissal isn't misconduct under the employment insurance law.

[10] 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

[11] 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

[12] 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

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.

means that it has to show that it is more likely than not that the Claimant lost his job because of misconduct.⁶

[13] A finding of misconduct can only be made on clear evidence, not on speculation or supposition, and not on the basis of the employer's opinion.⁷ Misconduct cannot be found where the evidence is either lacking, deficient or confusing.⁸

[14] It is not the role of the Tribunal to determine whether the dismissal was justified, or was the appropriate sanction.⁹

[15] The Commission says that there was misconduct because the Claimant's non-compliance with the Policy was wilful. He knew that termination of his employment would be the consequence of his non-compliance. He knew that termination of his employment would interfere with his ability to carry out his duties for the employer. His non-compliance caused the loss of his job.

[16] The Claimant says that there was no misconduct because the Policy was impossible to meet given the short time frame to be fully vaccinated. The late notice of the Policy gave him less time to comply. He was not aware of dismissal as a consequence of non-compliance. He was wrongfully dismissed. The Commission assumed that the Policy was reasonable when it was not.

– **The factual background**

[17] The Claimant worked as a project manager for fuel spills, for an engineering and environmental subsidiary of a large corporation, S. He had worked for the employer for 10 years, five years as a project manager. Most of his work was in the field, responding to clean up of environmental spills. He would attend the site of the spill, take samples, assess what was needed and arrange for and supervise the work to be done. This did not require physical contact or proximity with contractors who did the work. He also prepared seven to 10 reports per month, either from his own work or from notes

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

⁷ *Crichlow v Canada (Attorney General)*, A-562-97.

⁸ *Canada (Attorney General) v Granstrom*, 2003 FCA 485.

⁹ *Canada (Attorney General) v Caul*, 2006 FCA 251.

prepared by others. The majority of his work did not involve personal contact with others. He worked about 90% of the time alone, and outdoors. He did not go to the employer's office that often, but maintained contact by phone and email.

[18] The Policy was created by S to provide a safe work environment for employees, customers and members of the public. S required that all its subsidiaries abide by the Policy. The Policy terms were as follows. The Policy applied to all employees physically attending an office, worksite or location of S, including client's offices. The Policy is undated, but was effective October 12, 2021, with the statement "It is hoped that this notice will provide time for more Employees to seek vaccinations." The Policy requires mandatory vaccination against COVID-19, subject to some qualifications. Effective October 12, 2021, only fully vaccinated employees will be permitted to enter S physical work locations, including client sites. Employees were considered "fully vaccinated" two weeks after completing the vaccine series (either two doses or one does) and any booster shots recommended by health authorities. Employees were required to disclose their vaccination status, and upload proof of vaccination, in the work portal site no later than October 12th. Employees who chose not to share their vaccination status were to be treated as not fully vaccinated. The Policy did provide for accommodation of employees who provided a valid human rights-related reason for not receiving the vaccination. The Policy provided consequences for those employees who had chosen not to be vaccinated for non-human rights reasons, or who had refused to disclose their vaccination status. The consequences were: restricting access to the workplace, including client sites; determining if the employee's role is conducive to remote work on a temporary basis, subject always to the needs of the business; modifying the terms of the employment contract, such as another role for the employee that does not require physical attendance; being placed on unpaid leave; or termination of the employment contract. That list was not exhaustive, and S could consider other alternatives in each individual circumstance. Employees failing to follow the Policy may be subject to disciplinary action up to and including termination of employment. The Policy provided for confidentiality of employees' vaccination information.

[19] On October 1, 2021, the employer posted the Policy on its work portal on the web. The Claimant did not see the Policy until October 5th, when a co-worker emailed a copy of the Policy to him on October 4th. He was in the field between those dates, and was checking his emails. He did not have access to the portal on those dates. There was no email notification that the Policy had been posted in the portal. There was some confusion in emails from managers about what was to happen if an employee did not have full vaccination by October 12th. There was a suggestion of flexibility if the first dose had been taken and proof was uploaded to the work portal. But that would have to be negotiated with the human resources department (HR). On October 5th, the Claimant completed the survey of vaccination status, selecting the option "prefer not to say". There was no further communication from the employer until the letter of October 12, 2021.

[20] In conversations with the Commission, the employer stated that it had sent an email to managers about the policy. The employer stated that all employees must be double vaccinated or show proof of booking, and if they did not adhere, the result will be termination. (GD3-26) The copy of the October 4th email to the managers forwarding the Policy said nothing about termination of employment. It did state that the two vaccination certificates must be uploaded to the portal on or before October 12th for employees to enter the employer's office and meet with clients. It also states that if an employee has one vaccination at this point in time, they will be able to upload your second certificate once that is done. (GD2-26) That last statement is not in the Policy. Two October 5th emails forwarding the Policy to the Claimant also say nothing about termination of employment. They simply refer to some flexibility if the first vaccine is administered by October 12th, and to negotiating with HR about obtaining two vaccines by October 12th. (GD2-28 and 24)

[21] On October 12, 2021, the Claimant received a letter from the employer. The letter referred to the Policy, and said the Claimant had chosen not to be vaccinated or provide proof of human rights protection. Based on that, and the lack of a role in which he could work remotely, the employer had no choice but to terminate his employment for cause effective October 12th. That was the first notice to the Claimant that the

employer would actually end his employment, rather than apply the other options in the Policy.

[22] That day, the Claimant contacted his manager about the letter. The manager said it was more of a warning, and to contact HR. The Claimant left a voice mail message for HR. HR called back on October 14th, then sent the Claimant an email at 1:54p.m. HR said there that if it was unable to locate a role internally to work remotely, and if he did not comply with the Policy, the employer had no option but to terminate his employment. The email did outline an option to extend the date for compliance. The plan required the Claimant to give written confirmation of a vaccination plan by 3:00p.m. the next day, October 15th. The plan required scheduling the two doses, providing written confirmation of both doses and waiting 14 days before returning to the office. If the Claimant completed the plan, he would remain employed and “there will be absolutely no consequences or work stoppages.” The language in the email was ambiguous about the first step in the plan. It appeared to require proof of the first dose of the vaccination by the deadline, then appeared to allow proof of booking the first dose by the deadline.

[23] The Claimant did not file a plan. On October 15, 2021, the Claimant received a phone call from HR to advise that he was terminated with cause. He also received another letter from the employer. The letter referred to the Policy. It stated that the Claimant had “chosen not to be vaccinated and provided no proof under protected human rights ground/refuse to disclose your vaccination status and provide proof of vaccination equating to insubordination and leaving us with no choice but to terminate your employment for cause effective October 12, 2021.”

– **Ruling on misconduct**

[24] I find that the Commission hasn’t proven that there was misconduct, because it did not meet the onus of proving two of the four elements of misconduct. The Commission had to prove all four in order to succeed. In coming to this conclusion, I am mindful that it is the actions of the Claimant that are relevant, and whether they amount to misconduct for EI purposes. The issue is not whether the employer was

guilty of misconduct in engaging in wrongful dismissal.¹⁰ It is not the role of the Tribunal to determine whether the dismissal was justified, or was the appropriate sanction.¹¹

[25] With respect to the first element, whether the Claimant's actions were wilful (conscious, deliberate, intentional), the evidence is clear. He did not disclose his vaccination status to the employer. He did answer the employer's survey, checking the option "prefer not to say". He thought that the employer did not have a right to know his vaccination status. He provided no further information on his vaccination status. On that evidence, the Claimant's non-disclosure of his status was wilful.

[26] The next element of misconduct is whether the Claimant knew or should have known that his conduct could get in the way of carrying out his duties toward his employer. I find that the Commission fails to meet the onus of proof for this element. The problem lies with the Policy, and with the nature of the Claimant's work for the employer. The Policy required all employees to become fully vaccinated against COVID-19 by October 12, 2021. Only fully vaccinated employees "shall be permitted" to access the employer's and clients' physical work locations. The employer released the Policy on October 1, 2021. It defined "fully vaccinated" to occur two weeks after completing an approved vaccine series, and two weeks after receipt of a booster shot. Based on that definition and the release date, anyone who had not completed a vaccine series prior to the release of the Policy could not comply by October 12th. The Policy had no provisions to extend time for employees who could not meet the deadline to be fully vaccinated. The Policy further required the employee to disclose their vaccination status and upload proof of vaccination by October 12th. The Policy provided that the employer could implement alternative measures if an employee refused to disclose whether they were vaccinated or not. The five listed measures were not exhaustive. Three of the measures involved the employee continuing to work in a different capacity. The last two measures were unpaid leave, or termination of employment. The Policy

¹⁰ *Paradis v Canada (Attorney General)*, 2016 FC 1282.

¹¹ *Canada (Attorney General) v Caul*, 2006 FCA 251.

later stated that employees failing to follow the Policy may be subject to disciplinary action up to and including termination of employment.

[27] The Commission did not consider the nature of the Claimant's work in assessing whether the Claimant's non-compliance with the Policy would interfere with carrying out his duties to the employer. The Commission had some information about the nature of the Claimant's work, but did not follow up to obtain a clear picture of how non-compliance might interfere with his duties to the employer. The Claimant told the Commission that he worked in the field to gather samples. (GD3-25) The employer told the Commission that the "claimant works outside most of the time, but he also has to speak to clients in person", and that "if he got vaccinated then they could have worked with him to rearrange his work." (GD3-53) The Claimant stated in his request for reconsideration that "I work 90% alone and outdoors", and "drive alone, work outdoors and sample soil almost never see clients or have indoor meetings" (GD3-50) The Claimant confirmed these statements in his testimony. He also testified about preparing reports from his own notes, or notes of other employees, remotely. What this evidence shows is that any interference with the duties to the employer would be minimal. The employer's statement that it could have worked to rearrange his work (IF he got vaccinated) shows that any interference with the duties was minimal, and that the employer could have worked with the Claimant even if he was not fully vaccinated. That contradicts the employer's claim in the two termination letters that it had no choice but to dismiss the Claimant.

[28] The difficulties in the Policy, and the nature of the Claimant's work, lead me to conclude that the Commission has not met the onus of proving this element. The Policy made it impossible for employees not fully vaccinated before October 1, 2021, to comply. The absence of anything in the Policy to deal with such employees was not cured by the two October 5, 2021, emails suggesting some flexibility. Nor was that absence cured by the October 14, 2021, email from HR giving the Claimant 24 hours to provide a plan. He had already had his employment terminated on October 12th. That letter said the employer was "unable to locate a role internally in which you could work remotely, you are leaving us with no choice but to terminate your employment for cause

effective October 12, 2021.” (GD3-33) The statement that the employer could find no role for the Claimant is contradicted by the employer’s subsequent statement to the Commission that “if he got vaccinated then they could have worked with him to rearrange his work.” (GD3-53) It is also inconsistent with the employer’s statement in the October 14th email that “in the event that we are unable to locate a role internally in which you could work remotely”. (GD-37) The employer had already said in the October 12th letter that it had no such role. The nature of the Claimant’s work, as set out above, show that he was already working alone most of the time. That avoided personal contact for the majority of his work. As the employer said, it could have worked with him to rearrange his work. The employer’s statements that it had no choice, or no option, but to dismiss the Claimant are not credible. The evidence does not support the Commission’s conclusion that it had proven this element of misconduct.

[29] The third element of misconduct is whether the Claimant knew or should have known that there was a real possibility of being let go because of not complying with the Policy. I find that the Commission fails to meet the onus of proof for this element as well. The employer’s statement (GD3-26) that the email enclosing the policy stated that non-adherence will result in termination is not true. That is the only evidence that the Claimant had actual knowledge of the possibility of termination, until the letter of October 12th, telling him he had been dismissed. The Policy laid out five measures for dealing with non-compliance, the last of which was termination of employment. I accept the Claimant’s testimony that he did not know that he would be fired for non-compliance with the Policy. That leaves open the question of whether the Claimant should have known that dismissal was a real possibility. I find that the Commission has not proven this. As the Claimant testified, he had been a senior project manager since 2016 and has had a good relationship with the employer. His manager confirmed this. (GD3-26) The nature of his work minimized the need for physical contact with co-workers, clients and contractors. He was the only employee in the territory he worked in. That was located in northern Ontario. His closest co-worker was 300 kilometres away. It was impossible for him to meet the October 12th deadline to be a fully vaccinated employee. The Policy did not provide alternatives to being fully vaccinated or having a human rights exemption, by the deadline. The Policy said that those who did not comply by the

deadline would be treated as not being fully vaccinated. The Policy provided alternative measures applicable to employees who chose not to be vaccinated for non-human rights reasons, or who refused to disclose their vaccination status. There were four measures less than termination of employment, and the possibility of other alternatives in each individual circumstance. The Policy identified no criteria for applying any of the measures. An employee would not be able to forecast which measure might be applied to him. In these circumstances, especially the nature of his work, I am not satisfied that the Claimant should have known of the possibility of dismissal.

[30] The Commission argued that the Claimant knew he would be dismissed because the employer had warned him with termination on October 12, 2021, and then provided him with extra time to save his employment. That misconstrues the October 12th letter from the employer. It was a termination of employment, not a warning. The October 14th email from the employer's HR department is incorrect in stating that the "letter sent to you on October 12, 2021, was to explain our position in regards to you not complying with the policy: *Please note as you are employed in a client facing role, in the event that we are unable to locate a role internally in which you could work remotely, should you not comply with the policy we will have no option but to terminate your employment.*" (GD37, italics in original) The italicized text purported to quote the October 12th letter. That letter actually stated, "Please note as you are employed in a field role providing services for our clients, (more of which each day are requesting only fully vaccinated employees attend their sites) and because we are unable to locate a role internally in which you could work remotely, you are leaving us with no choice but to terminate your employment for cause effective October 12, 2021." The October 12th letter contained no warning. Had that letter been a warning, it would have outlined the plan set out in the October 14th email and the extended deadline. The employer was attempting to rewrite what had actually happened. The employer's letter of October 15, 2021, makes no reference to the October 12th letter or to the October 14th email, or to the plan set out in that email, or to the extended deadline. The October 15th letter simply terminates the employment as of October 12, 2021, for failure to disclose vaccination status, then continues with administrative provisions for final pay, benefits, vacation time owing, return of the employer's property and so on. The October 14th

email did not reinstate the Claimant's employment, despite saying at the end that if he completed the plan he will remain employed with absolutely no consequences or work stoppages. First, the letter of October 12th came from the employer's President. The email of October 14th came from the HR manager of S. It contains no authority to revoke the President's termination letter of October 12th. The letter of October 15th came from the employer's Senior Vice-President, again with no reference to the President's October 12th termination letter having been revoked. The October 15th letter also terminates the Claimant's employment effective October 12th, not October 15th, which would be the correct date if the October 12th termination had been revoked and a new deadline of October 15th been established. In these circumstances, the Claimant's employment ended on October 12, 2021. I must assess, and have assessed, the issue of misconduct as of October 12, 2021.

[31] The fourth element of misconduct is that the alleged misconduct caused the termination of the employment. I find that the Commission has proven this element. The Claimant's failure to disclose his vaccination status was the reason given by the employer for the dismissal. The Claimant referred to being targeted, and to being treated differently than other employees who did not comply but who remained employed. Those concerns are insufficiently detailed to cast doubt on the employer's reason for the dismissal. I find that the Claimant's non-disclosure of his vaccination status was the cause of the termination of his employment. Even though the failure to disclose was the cause of the dismissal, that does not by itself establish misconduct for EI purposes. The Commission had to prove all four elements, and has not done so.

[32] The Claimant dealt with the concept of misconduct in his notice of appeal. He referred to the Ontario *Employment Standards Act*, and to three court decisions, in support of an argument that his conduct did not amount to misconduct. This argument does not succeed. That is because the concept of misconduct in the *Employment Insurance Act* is quite different from the concept of misconduct in the *Employment Standards Act*, and in the common law of employment as set out in court decisions. The *Employment Standards Act* does not define 'misconduct', so relies on the common law definition of the term. The three court decisions the Claimant refers to deal with the

common law concept of misconduct, for the purposes of two wrongful dismissal lawsuits, and an arbitration under a collective agreement between a union and an employer. The Commission and the Tribunal must use the definition of misconduct under the *Employment Insurance Act*, and cannot use the common law definition in deciding this case. Wrongful dismissal is not within the jurisdiction of the Tribunal to decide. A remedy for wrongful dismissal lies with the courts.

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

[33] Based on my findings above, I find that the Claimant didn't lose his job because of misconduct.

Conclusion

[34] The Commission hasn't proven that the Claimant lost his job because of misconduct. Because of this, the Claimant isn't disqualified from receiving EI benefits.

[35] This means that the appeal is allowed.

Paul Dusome

Member, General Division – Employment Insurance Section