Citation: *AC v Canada Employment Insurance Commission*, 2022 SST 588

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

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

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (446772) dated January 26, 2022 (issued by Service Canada)

Tribunal member:	Solange Losier
Type of hearing:	Videoconference
Hearing date:	March 24, 2022
Hearing participant:	Appellant
Decision date:	April 5, 2022
File number:	GE-22-335

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 not entitled to receive Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant worked at a hospital in various roles. The employer first suspended and then dismissed the Claimant on October 12, 2021 because he did not comply with "Directive 6" for Public Hospitals (Directive 6).[2] The Claimant then applied for Employment Insurance regular benefits.[3]

[4] The Canada Employment Insurance Commission (Commission) decided that the Claimant was not entitled to receive benefits because he lost his employment due to his own misconduct.[4]

[5] The Claimant disagrees because it is medical coercion to force someone to get a covid19 vaccine is illegal.[5] He said that the safety and efficacy trials for the vaccination had not been completed, that vaccinated people can still transmit covid19 and everyone has a right to refuse.

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[1] Section 30 of the *Employment Insurance Act* says that claimants who lose their job because of misconduct are disqualified from receiving benefits.
[2] See Directive 6 at GD21-1 to GD21-17.
[3] See application for benefits at GD3-3 to GD3-12.
[4] See initial decision dated December 8, 2021 at GD3-16 to GD3-17 and reconsideration decision dated January 27, 2022 at GD3-30 to GD3-31.
[5] See notice of appeal forms at GD2-1 to GD2-8.

Matters I have to consider first

A pre-hearing conference (PHC) was scheduled for this file

[6] I scheduled a PHC with the Claimant to discuss the scheduling of the hearing. I told him that I could not review any of the web links for the articles he submitted.[6] I asked him to submit full copies of the articles he wants to rely on.

[7] The Claimant also raised a concern. He said that since employees of the Federal Government were mandated to be vaccinated, it would affect the impartiality and neutrality of the decision maker.[7] I told the Claimant that if he wanted to prepare arguments around bias, that he could present them at the scheduled hearing date.

[8] At the hearing, the Claimant declined and did not proceed with his bias argument. As a result, it was not considered.

The Tribunal cannot review web links

[9] The Claimant sent in another web link to an article after the PHC took place.[8] I wrote the Claimant a letter to ask him to submit an entire copy of each article for every web link he sent.[9] I note that the Claimant did not comply with my request to submit full articles for his previous web link submissions, however he did submit a full articles for any subsequent information he sent.

I asked the Commission for information before the hearing

[10] The Commission referenced the employer's web page, Directive 6 and a record of employment.[10] I wrote to the Commission to tell them that I could not review the

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[6] The pre-hearing conference was held on February 22, 2022; see GD11-1 to GD11-3; see GD8A1-1 to GD8A1-2; GD12-1 to GD12-2.
[7] See GD8-1.
[8] See GD14-1 to GD14-3.
[9] See letter dated March 7, 2022 at GD15-1 to GD15-2.
[10] See Commission's representations at GD4-1 to GD4-5.

employer's web page and asked the Commission to provide a copy of these documents they referenced.[11]

[11] The Commission did not respond to my request by the deadline set out in the letter, or as of the date of this decision.[12]

The Claimant submitted documents after the hearing

[12] At the hearing, the Claimant said that he would submit a copy of his record of employment; Directive 6 and information from the hospital website. Since these documents were relevant, I accepted them when they were submitted by the Claimant and they were added to the file.[13] A copy was shared with the Commission.

[13] After the hearing took place, the Claimant spoke to an agent over the telephone and asked if we had received YouTube web link along with some documents he sent. I wrote to the Claimant confirming receipt and acceptance of the post-hearing documents and reminded him that I could not review YouTube web links.[14]

Issue

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

Analysis

[15] Claimants who lose their job because of misconduct are disqualified from receiving benefits.[15]

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[11] See letter dated March 23, 2022 at GD20-1 to GD20-3; see section 32 of the *Social Security Tribunal Regulations.*
[12] The deadline is March 28, 2022 at GD20-1 to GD20-3.
[13] See GD21-1 to GD21-17 sent to the Tribunal on March 24, 2022; see GD23-1 to GD23-9 sent to the Tribunal on March 31, 2022.
[14] See letter dated March 29, 2022 at GD22-1 to GD22-2.
[15] Section 30 of the *Employment Insurance Act* (Act).

[16] Claimants who are suspended from their employment because of their misconduct are not entitled to receive benefits until their period of suspension expires, or loses or voluntarily leaves their employment, or if they accumulate enough hours with another employer after the suspension started.[16]

[17] 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 was suspended and then why he lost his job. Then, I have to determine whether the law considers that reason to be misconduct.

Why did the Claimant lose his job?

[18] I find that the Claimant was first put on an unpaid leave of absence or suspended from his job on September 21, 2021 for not following Directive 6. This is consistent with his testimony and his statement to the Commission.[17]

[19] I find that the Claimant was dismissed from his employment on October 12, 2021. This is consistent with his testimony, his statement to the Commission and record of employment.[18]

[20] I find that the Claimant did not comply with Directive 6, so he was placed on an unpaid leave of absence or suspended from his job and then dismissed.

[21] I acknowledge that the employer did not have their own policy, but rather they were relying on Directive 6 which had been implemented at the hospital in early September 2021. The employer confirmed with the Commission that they did not have their own hospital policy, but that the Claimant was expected to comply with Directive 6 at the hospital.[19]

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[16] See section 31 of the Act.
[17] See supplementary record of claim dated December 6, 2021 at GD3-14 to GD3-15.
[18] See supplementary record of claim dated December 6, 2021 at GD3-14 to GD3-15; see record of employment at GD21-17.
[19] See employer's email dated January 27, 2022 at GD3-29.

What is “Directive 6”?

[22] The Commission and the Claimant referred to “Directive 6” in the documents and at the hearing. I did not have a copy of Directive 6 in the file, so the Claimant supplied a copy to the Tribunal after the hearing and it was added to file.[20]

[23] I reviewed Directive 6 and noted the following relevant parts.

[24] Ontario’s Chief Medical Officer of Health issued Directive 6 on August 17, 2021. If affects hospitals and has legal force and effect.[21] It says that if the Chief Medical Officer of Health decides there exists or may exist an immediate health risk to the health of anyone in Ontario, they may issue Directive to any health care provider, which includes a public hospital.[22] A health care provider has to comply with it.[23] This means that the Claimant’s employer, a public hospital was required by law to comply with Directive 6.

[25] It requires employer’s to establish, implement and ensure compliance with a covid19 vaccination policy requiring its employees, staff, contractors, volunteers and students to provide:

a) Proof of full vaccination against COVID-19; or

b) Written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out: (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time-period for the medical reason; or

c) Proof of completing an educational session

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[20] See GD21-3 to GD21-6 for Directive #6 for Public Hospitals within the meaning of the *Public Hospitals Act,* Service Providers in accordance with the *Home Care and Community Services Act, 1994 ,* Local Health Integration Networks within the meaning of the *Local Health System Integration Act, 2006 ,* and Ambulance Services within the meaning of the *Ambulance Act, R.S. O. 1990, c. A. 19.*
[21] See section 77.7 of the *Health Protection and Promotion Act* (HPP Act), R.S.O. 1990, c. H.7.
[22] See section 77.7(1) of the HPP Act.
[23] See section 77.7(3) of the HPP Act.

[26] Directive 6 allowed the Claimant's employer to remove proof of educational session option and require all employees, staff, contractors, volunteers and students to either provide the proof required in paragraph (a) or (b).

[27] It also says that where an employee, staff, contractor volunteer, or student does not provide proof of being fully vaccinated against COVID-19 but instead relies upon the medical reason or the educational session (if applicable) they must submit to regular antigen point of care testing for COVID-19 and demonstrate a negative result, at intervals to be determined by the Covered Organization. This must be at minimum once every seven days and they must provide verification of the negative test result in a manner determined by the organization (hospital in this case).

What were the consequences of not complying?

[28] The Claimant says that he did not know that he would be suspended or dismissed from his job. He does not understand or know the reason he was terminated from his job. He argues that Directive 6 does not require employers to suspend or terminate employees for not complying.

[29] The Claimant did admit that he heard through the "grapevine" that non-compliance would lead to a mandatory leave of absence and then termination.

[30] The employer told the Commission that hospital staff were notified of Directive 6 and mandatory antigen testing on September 1, 2021 and multiple times after.[24] They wrote that it was communicated via email, verbally at town halls, and verbally and in writing from the Manager. The employer said that the Claimant was aware this would result in job loss and was issued multiple levels of discipline before termination, but that he refused antigen testing.

[24] See employer's email dated January 27, 2022 at GD3-29.

[31] I reviewed the employer's statement with the Claimant at the hearing. He denied that the employer told him about the requirements and consequences for not complying with Directive 6. He receives thousands of spam emails and since he only worked part-time, he was not always on-site to receive communications. He also denies that he ever refused to do antigen testing.[25]

[32] I agree with the Claimant in part. Directive 6 does not outline the consequences of non-compliance for employees. However, it does require the employer to ensure compliance with Directive 6, which means that the Claimant needed to comply with it as well.

[33] However, I was not persuaded by the Claimant's testimony that he had no knowledge that he would be suspended or dismissed for failing to comply with Directive 6.

[34] I did not find the Claimant's testimony credible on this issue, particularly when he said that he did not know why he was terminated and was not told about the consequences. In my view, it is clear that he was terminated for not complying with Directive 6 and not for any other reason. He also told the Commission that he was dismissed for refusing to be vaccinated for covid19, which supports that he knew why he was terminated.[26]

[35] I preferred the employer's statement to the Commission because I think it is more reliable. I find it more likely than not, that the employer did issue disciplinary action against him for not complying with Directive 6 by failing to either be vaccinated, or submit to antigen testing. The Claimant admitted that he had some knowledge that his conduct would lead to his suspension and termination. In any event, the Claimant ought to have known that by not complying with Directive 6 as instructed by his employer, it would lead to his dismissal.

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[25] See employer's email dated January 27, 2022 at GD3-29.
[26] See supplementary record of claim dated December 15, 2022 at GD3-19.

Is there a reason the Claimant could not comply with Directive 6?

[36] The Claimant said that he partly complied with Directive 6 because he completed the educational requirement. He also met with an occupational nurse, but she could not answer his questions to his satisfaction about the safety and efficacy vaccination trials.

[37] The Claimant agrees that he did not request an exemption based on a medical and/or religious ground. He explained that he was not willing to get a medical exemption and that they were impossible to obtain.

[38] I accept that the Claimant complied in part with Directive 6 because he completed the educational session. While there was no supporting evidence to show that it was completed, I accepted his testimony on this issue.

[39] However, I do not find that the Claimant complied with the other requirements, specifically by providing proof of full vaccination against COVID-19; or written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out: (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time-period for the medical reason, or to submit to antigen testing.

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

[40] I find that the reason for the Claimant's dismissal is misconduct under the law.

[41] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.[27] Misconduct also includes conduct that is so reckless that it is almost wilful.[28] The Claimant does not have to have wrongful intent (in other words, he does not have to mean to be doing something wrong) for his behaviour to be misconduct under the law.[29]

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[27] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[28] See *McKay-Eden v Her Majesty the Queen*, A-402-96.
[29] See *Attorney General of Canada v Secours*, A-352-94.

[42] 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.[30]

[43] 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.[31]

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

[44] Based on my findings above, I find that the Claimant lost his job because of misconduct for the following reasons. The Commission has proven that he lost his job because of misconduct.

[45] First, I find that the Claimant willfully and consciously chose to not comply with the Directive 6. He had time to comply with the policy, particularly since he was put on a leave of absence or suspended before he was dismissed. In my view, he knew that further non-compliance would lead to his dismissal.

[46] Second, it does not matter that the employer did not have their own policy because they implemented Directive 6 at the hospital, which they were required to do. It was communicated to the Claimant and he had time to comply with it.

[47] Third, the *Ontario Human Rights Commission* has said that the vaccine remains voluntary, but that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the *Ontario Human Rights Code*[32] as long as protections are put in place to make sure people who are unable to be vaccinated for *Code*-related reasons are reasonably accommodated.[33]

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[30] See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.
[31] See *Minister of Employment and Immigration v Bartone*, A-369-88.
[32] *Human Rights Code*, R.S.O. 1990, c. H.19.
[33] See article titled “OHRC Policy statement on COVID-19 vaccine mandates and proof of vaccine certificates” dated September 22, 2021 at https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates.

[48] As noted above, the Claimant did not request an exemption for medical and/or religious/creed reasons. So, he has not proven that he was exempt from Directive 6.

[49] Fourth, I accept that the employer has a right to manage their day-to-day operations, which includes the right to develop and impose policies at the workplace. I also accept that the Claimant has a right to choose to get vaccinated, or to decline vaccination. However, when the employer imposed Directive 6 at the hospital, it became a fundamental condition of his employment. This resulted in a breach of his duties to his employer because he failed to comply with it by not providing proof of vaccination, or obtaining an exemption, or antigen testing.

[50] Lastly, I do not accept that the Claimant was being forced to vaccinate, but rather he had a choice. He chose to not get vaccinated for personal reasons and this led to undesirable outcomes, a leave of absence or suspension, dismissal and loss of income.

What if the Claimant disagrees with employer's penalty and Directive 6?

[51] The Claimant expressed several concerns. He explained that he was concerned about his private medical information being shared and collected by the employer. He also feels that his employer cannot force him to vaccinate. He said that the safety and efficacy trials of the vaccination were not completed and he could not get satisfactory answers to his questions from his employer. He has submitted several medical documents and information to support his position.[34]

[52] I do not have the authority to decide whether the employer breached his rights by suspending and dismissing him, or whether they could have accommodated him in some other way. I am also not a medical expert.

[34] See GD6; GD8A; GD10; GD12; GD13; GD14; GD16; GD17; GD18; GD19; GD23.

[53] The court has said that the Tribunal does not have to determine whether the dismissal was justified or whether the penalty was justified. It has to determine whether the Claimant's conduct amounted to misconduct within the meaning of the EI Act.[35]

[54] The Claimant's recourse is to pursue this action in court, or any other Tribunal that may deal with these particular matters.

[55] The Claimant said that he works in a unionized environment and the matter is already expected to go to arbitration in a few months.

Conclusion

[56] The purpose of the EI Act is to compensate persons whose employment has terminated involuntarily and who are without work. The loss of employment which is insured against must be involuntary.[36] In this case, it was not involuntary because the Claimant chose not to comply with the employer's policy for personal reasons and knew that his conduct would eventually lead to his dismissal.

[57] The Commission has proven that the Claimant lost his job because of misconduct. Because of this, the Claimant is not entitled to receive EI benefits.

[58] This means that the appeal is dismissed.

Solange Losier

Member, General Division – Employment Insurance Section

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[35] See *Canada (Attorney General)* v *Marion*, 2002 FCA 185.
[36] *Canada (Canada Employment and Immigration Commission*) v *Gagnon*, [1988] 2 SCR 29.