Citation: *RG v Canada Employment Insurance Commission*, 2022 SST 991

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	R. G.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision (451159) dated January 20, 2022 (issued by Service Canada)

Tribunal member:	Paul Dusome
Type of hearing:	Videoconference
Hearing date:	March 18, 2022
Hearing participant:	Appellant
Decision date:	March 31, 2022
File number:	GE-22-337

Decision

[1] The appeal is dismissed. The Tribunal disagrees with the Claimant.

[2] The Canada Employment Insurance Commission (Commission) has proven that the Claimant was suspended from his job because of misconduct (in other words, because he did something that caused him to be suspended from his job). This means that the Claimant is disqualified from receiving Employment Insurance (EI) benefits.[1]

Overview

[3] The Claimant was suspended from his job. The Claimant's employer is a department of the federal government within the executive branch of government. The employer said that he was suspended because he refused to comply with the employer's COVID-19 vaccination policy (Policy). The Policy required employees to disclose their vaccination status, and be fully vaccinated by a set date. If they did not comply they could be suspended.

[4] Even though the Claimant doesn't dispute that this happened, he says that the Policy is unreasonable, particularly in his circumstances. The Claimant says he has worked from home for a number of years, and has a contract to continue working from home until December 30, 2022. He poses no risk to co-workers or to members of the public he may have to interact with. His personal health information is private. He should not be forced to disclose it to the employer. He should not have been suspended. He should receive EI benefits.

[5] The Commission accepted the employer's reason for the suspension. It decided that the Claimant was suspended from his job because of misconduct. Because of this, the Commission decided that the Claimant is disqualified from receiving EI benefits.

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[1] Section 31 of the *Employment Insurance Act* says that claimants who are suspended from their job because of misconduct are disqualified from receiving benefits until the suspension ends, they lose or voluntarily leave their job, or they work enough hours with another employer to qualify to receive benefits.

Matter I have to consider first

Potential challenge to the Policy under the *Canadian Charter of Rights and Freedoms*

[6] I reviewed with the Claimant whether he wished to pursue a challenge to an interpretation of misconduct in the *Employment Insurance Act* based on the Policy. The employer being a federal government department, its Policy could be challenged under the Charter. We reviewed the process for pursuing a Charter challenge. The Claimant did not wish to pursue a Charter challenge, but rather to proceed with this appeal.

Issue

[7] Was the Claimant suspended from his job because of misconduct?

Analysis

[8] To answer the question of whether the Claimant was suspended from his job because of misconduct, I have to decide two things. First, I have to determine why the Claimant was suspended. Then, I have to determine whether the law considers that reason for suspension to be misconduct.

Why was the Claimant suspended from his job?

[9] I find that the Claimant was suspended from his job because he did not comply with the employer's COVID-19 vaccination Policy. The Claimant and the Commission agree on why the Claimant was suspended from his job. I see no evidence to contradict this finding.

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

[10] The reason for the Claimant's dismissal is misconduct under the law. The reasons for this conclusion will be reviewed below, under the headings "the law", "the facts", "the arguments of the parties", "the jurisdiction of the Tribunal" and "the ruling on the misconduct issue".

– The law

[11] 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]

[12] 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 suspended because of that.[5]

[13] The Commission has to prove that the Claimant was suspended from 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 was suspended from his job because of misconduct.[6]

[14] The above rules have been made in court decisions with respect to termination of employment for misconduct. The concept of misconduct is the same, whether the case involves termination of suspension. Therefore, those rules are equally applicable to suspension for misconduct.

– The facts

[15] The Claimant worked for a federal government department since mid-2018. He is a federal public servant. He had been promoted. He was on the health and safety committee. He was involved with the union as a shop steward. He worked in the employer's office until the shut down in March 2020 due to the COVID-19 pandemic. From that time to the imposition of the suspension on November 15, 2021, he worked from home with the employer's equipment and authorization. Initially, this was done under an informal agreement. The Claimant and the employer made a written Interim

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[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.

Work Agreement (IWA) for the Claimant to work from home. The IWA covered the period from September 10, 2021, to December 31, 2022. The IWA had been under discussion since August 2021. The employer emailed the IWA to the Claimant in January 2022. The email contained links to a number of training and information sessions dealing with health and safety, hazard prevention, harassment and violence prevention, returning to the workplace (self-assessment), and other safety issues. None of the links references the Policy. The Claimant testified that the Policy was not in the IWA. But the Claimant was aware of the Policy earlier on from other sources.

[16] The employer had given up the lease to its office where the Claimant had worked. The Claimant does not have an office to return to. The nearest other office of the employer is located about three hours' drive away. The Claimant's job did not involve much contact with the general public. Since the shutdown, he has been able to do all his job duties by electronic communications with co-workers. Since the lockdown, 100% of his job can be done without any physical contact with others. He remains on suspension. He does want to return to work with the employer.

[17] The federal government announced on October 6, 2021, that all federal public servants must be fully vaccinated. The announcement referred to, but did not include, the Policy. A copy of this announcement, modified on November 30, 2021, was the document the Commission relied in making its decision. Since the Claimant had been suspended on November 15, 2021, I asked him to provide a copy of the Policy as it read before his suspension. The Claimant submitted a copy of the Policy obtained from the government website. It had been updated on October 6, 2021, prior to the suspension. The Tribunal sent a copy to the Commission on March 17, 2021. The Commission has provided no response.

[18] The terms of the Policy are clear. Under "Objectives", it states "all employees, including those working remotely and teleworking must be fully vaccinated to protect themselves, colleagues, and clients from COVID-19." There is an exception to this requirement for accommodation on certified medical grounds, religion or another prohibited ground for discrimination under the *Canadian Human Rights Act.* The

treatment of personal information must respect the provisions of the *Privacy Act* and other applicable legislation. Employees are responsible for disclosing their vaccination and testing status accurately as required by the Policy. Under "Application", defined employees must comply with the Policy regardless of whether they work on-site, remotely or telework. There is no dispute that the Policy applies to the Claimant. For employees refusing to be fully vaccinated or to disclose their vaccination status, the Policy outlines progressive steps to be taken, from attending COVID-19 vaccination training, to restricting the employee's access to work, and finally placing the employee on administrative leave without pay, telling them not to report to work or to stop working remotely. The deadlines for most employees, including the Claimant, for compliance with the Policy was October 29, 2021.

[19] The Claimant was aware of the Policy, and its contents, from the time the Prime Minister announced it, to emails, to online access, to discussions with his manager, and with his union, all occurring prior to his suspension. He did not want to disclose his vaccination status. That was private information. Compulsory vaccination took away his right to make his own medical decisions. The manager said he was bound by the Policy. The union said that vaccination was the best remedy. It was not opposing the Policy, and would not support him. The Claimant refused to comply with the Policy. He did not disclose his vaccination status to the employer, nor did he ask for an exemption. He said that the employer did not have the right to interfere with his right to choose. He made a personal medical decision. The Policy was unreasonable when he worked at home and would continue to do so for another year. He was aware that he could be suspended for refusing to comply. The employer suspended him pursuant to the Policy. The Claimant brought a lawsuit, seeking an injunction to stop the vaccine mandate, and for financial compensation for being suspended without pay. The injunction was refused. The claim for compensation is pending.

[20] In three post-hearing documents, the Claimant provided further evidence to support his position. First, to counter the Policy's assertion that vaccination was the best protection of employees against COVID-19, and to support his own position that the vaccines were not effective, the Claimant provided three charts from the federal

government showing the total reported cases of COVID-19 in the federal public service. The number of cases rose from 5,961 on October 13, 2021, to 6,295 on November 24, 2021, to 21,316 on March 2, 2022. Second, the Claimant included a screen shot of his Service Canada account. It showed two entries. One for January 20, 2022, stating that benefits were not payable due to suspension from employment. The other for January 23, 2022, showing that he was no longer considered to have lost his employment due to misconduct, and that no misconduct was involved when he lost his employment effective November 7, 2021. Third, the Claimant included a screen shot of a Commission webpage dealing with eligibility for benefits. The screen shot shows a section titled "COVID-19 vaccination". It states that in most cases, failure to comply with the employer's mandatory COVID-19 vaccination policy makes you ineligible for regular EI benefits. It states that the Commission may contact you to obtain information to determine if you are eligible. The four listed items of information are: if the policy was clearly communicated to you by the employer; if you were informed that failure to comply would result in losing your employment; "<u>if applying the policy to you was reasonable within your workplace context</u>" [Claimant's emphasis]; and if you had a valid reason for not complying and the employer did not provide an exemption.

[21] I will deal with the first and third post-hearing items in assessing the Claimant's arguments, in the section dealing with the jurisdiction of the Tribunal. I can deal with the second item here. The Service Canada account screen shot does not assist him. The January 20th entry shows the reconsideration decision made on January 20, 2022. That decision replaced the original decision about losing the job due to misconduct. The January 23, 2022, entry shows that the original decision had been cancelled. The statement about "no misconduct" in that entry is related to the original loss of employment decision, not to the suspension decision. As the January 20, 2022, reconsideration decision states, "misconduct is still proven". The document does not support the Claimant's assertion that the Commission had determined there was no misconduct related to the suspension.

– **The arguments of the parties**

[22] The Commission says that there was misconduct because the Claimant consciously refused to comply with the vaccination Policy. He knew the Policy applied to all employees, even those working remotely or from home. He knew refusal would lead to suspension. He was given the opportunity to seek accommodation on medical or religious reasons, but he declined. His employer and union supported compliance with the Policy. The Commission is not required to prove that the employer's Policy is reasonable. The employer's conduct, and the Claimant's personal beliefs, are irrelevant. The Tribunal does not have the authority/jurisdiction to rule on vaccine efficacy, or to determine if the employer acted fairly or reasonably. Claims that the employer's actions amount to discrimination under the *Canadian Human Rights Act* do not apply to misconduct, they only apply to cases involving the voluntarily leaving employment.[7] The Claimant can pursue those arguments in other proceedings.

[23] The Claimant says that there was no misconduct because the Policy was not reasonable. There are two facets to the unreasonableness. First, the vaccine does not stop the spread of COVID, which is the rationale for the Policy. The Policy does not achieve its goals. Second, it was unreasonable to apply the Policy to him when he was working from home and not at risk of spreading COVID to co-workers or the public. The employer would want him to continue working from home to prevent the spread of the virus. The Policy is applied unfairly to him and others like him. The Policy does not respect citizens and workers. The Policy threatens his livelihood and may violate medical privacy. The Policy was not a bona fide occupational requirement. The Policy is a material change of his terms and conditions of employment. The application of the Policy to him is discriminatory, contrary to the *Canadian Human Rights Act,* with respect to genetic therapy, which includes the mRNA vaccines. The Policy violates the Nuremberg Code, an international document against coercion in any medical procedure.

[7] See *Employment Insurance Act*, section 29(c)(iii).

– The jurisdiction of the Tribunal

[24] The Tribunal has limited authority in making decisions. Unlike the superior courts, the Tribunal does not have wide-ranging authority to deal with all legal issues that may be presented to it. The General Division EI Section of the Tribunal may dismiss the appeal, confirm, rescind or vary the decision of the Commission in whole or in part or give the decision that the Commission should have given.[8] That limits what the Tribunal can do in EI matters to decisions the Commission makes with respect to benefits under the *Employment Insurance Act* and its regulations. The Tribunal General Division EI Section has to work within that framework. The Tribunal's authority to decide any question of fact or law necessary for the disposition of the appeal is similarly limited.[9] The Tribunal lacks the authority to rule on many of the arguments advanced by the Claimant.

[25] The Claimant says that the Policy is not reasonable because it does not achieve the goal of stopping the spread of COVID. In support of that, he supplied screenshots of reported cases of COVID in the federal public sector. The number more than tripled between October 2021 and March 2022. It is not the role of the Tribunal to determine whether the dismissal was justified, or was the appropriate sanction.[10] The issue is not whether the employer was guilty of misconduct by engaging in unjust dismissal; rather, the question is whether the applicant was guilty of misconduct.[11] Those principles, from decisions involving dismissal rather than suspension, apply equally to cases of suspension. Ruling on whether the Policy was reasonable would take the Tribunal into the areas closed to it under those principles. Ruling on a public health issue is well beyond the scope of the Tribunal's expertise in EI matters, and lies outside its jurisdiction. The Tribunal also does not have authority to engage in the fact-finding to decide questions about the vaccine's effectiveness. Those are matters for the courts to resolve.

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[8] *Department of Employment and Social Development Act*, section 54(1).
[9] *Department of Employment and Social Development Act*, section 64.
[10] *Canada (Attorney General) v Caul*, 2006 FCA 251.
[11] *Paradis v Canada (Attorney General)*, 2016 FC 1282.

[26] The Claimant also says that it is not reasonable to apply the Policy to him in the circumstances of his working from home, and not interacting with co-workers or the public in his work. The application of the Policy to him is unfair. In support of that, he supplied the Commission's statement on losing your job because you didn't comply with the employer's mandatory COVID-19 vaccination policy. One of the factors in making a decision on eligibility for EI benefits is: "if applying the policy to you was reasonable in your workplace context". Misinformation by the Commission is no basis of relief from the operation of the Act.[12] Commission agents` interpretation of the law does not have the force of law. Commitments to act in a way other than written in law is absolutely void.[13] The Commission has no authority to change the law, so any statements doing so are of no effect. 'Reasonableness' is not part of the criteria used in the EI law to assess misconduct. The Commission's statement quoted above does not change the law.

[27] The difficulty with giving effect to the Claimant's argument that it is not reasonable to apply the Policy in his circumstances radically alters the Policy. The Policy applies to all employees, whether teleworking, working remotely or working on-site. If the Claimant succeeds in this argument, the Policy will not cover all the employees who are working remotely. That would be a large number, given the widespread use of remote working during the pandemic. That would take the Tribunal outside its jurisdiction. That jurisdiction is to rule on the individual appeals it hears, within the context of the EI law. That jurisdiction does not extend to passing judgment on the broader application of employers' policies or contract terms. Nor does it extend to giving a ruling that would substantially alter an employer's policy.

[28] Disrespect is not a legal ground on which to decide whether there was no misconduct.

[29] The Claimant said that the application of the Policy to him threatens his livelihood. The Tribunal's authority on that matter is limited to determining whether he

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[12] *Canada (Attorney General) v Shaw*, 2002 FCA 325.
[13] *Granger v Employment and Immigration Commission*, A-684-85, affirmed [1989] 1 S.C.R. 141.

qualifies for EI benefits, under the EI rules. Any other matters relating to his livelihood would have to be dealt with by the courts, or by the union.

[30] The Claimant said that the employer's demand that he disclose his private medical information may violate medical privacy. The Policy does provide for the confidentiality of the Claimant's information in accordance with applicable privacy laws. The Claimant expressed some concern for the security of his personal information with the bureaucracy. The Tribunal does not have authority to rule on that issue. The proper authority is the government's privacy body that enforces privacy legislation, including medical issues.

[31] The Tribunal has no authority to rule on international agreements such as the Nuremberg Code. That lies outside the Tribunal's jurisdiction, and is a matter for the courts to resolve.

[32] The Claimant has also raised some matters that may be within the Tribunal's jurisdiction to deal with. One is that the application of the Policy to him is discriminatory, contrary to the *Canadian Human Rights Act,* with respect to genetic therapy, which includes the mRNA vaccines. Another is that the Policy requirement to be vaccinated is not a bona fide occupational requirement. Another is that the Policy is a material change of his terms and conditions of employment.

[33] The Claimant refers to breach of the *Canadian Human Rights Act*. This does not assist the Claimant. The reference to the *Canadian Human Rights Act* is based on paragraph 29(c) of the *Employment Insurance Act*, which deals with just cause for voluntarily leaving employment or taking leave from employment. It does not deal with dismissal or suspension for misconduct. The concept of just cause, defined in paragraph 29(c) of the EI Act, does not apply to misconduct. The Claimant's mention of discrimination with respect to genetic therapy relates to possible just cause based on discrimination under the *Canadian Human Rights Act*.[14] Since we are not dealing with just cause in this appeal, the Tribunal has no authority to deal with the human rights

[14] *Employment Insurance Act*, subparagraph 29(c)(iii).

claims in this appeal. To get any remedy for discrimination, the Claimant can deal with the Canadian Human Rights Commission and Canadian Human Rights Tribunal, or sue in court for wrongful dismissal, possibly including violation of the human rights law.

[34] The Claimant's reference to a bona fide occupational requirement also brings that issue within the *Canadian Human Rights Act*.[15] Any suspension (among other items) is not a discriminatory practice if the employer shows that it was based on a bona fide occupational requirement. It is a discriminatory practice in employment to refuse to continue to employ any individual or to differentiate adversely in relation to an employee on a prohibited ground of discrimination.[16] The remedy for the Claimant lies with the Canadian Human Rights Commission and Canadian Human Rights Tribunal. The Tribunal cannot deal with that issue in this appeal.

[35] The Claimant also refers to the Policy as a material change of his terms and conditions of employment. That raises issues of possible constructive dismissal. The Claimant mentioned in his application for EI benefits that both material change and constructive dismissal were actively before the courts. The remedy for those issues lies with the courts, not with the Tribunal.

– **The ruling on the misconduct issue**

[36] I must determine this appeal on the basis of the law set out above, at paragraphs [11] to [14].

[37] I find that the Commission has proven that there was misconduct, for the following reasons.

[38] First, did the Claimant know or should have known that his conduct could get in the way of carrying out his duties toward his employer? The evidence establishes that the Claimant knew the requirements in the Policy, and the consequence of suspension from his job for non-compliance with the Policy. He knew that "all employees, including those working remotely and teleworking must be fully vaccinated to protect themselves,

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[15] *Canadian Human Rights Act,* section 15(1)(a).
[16] *Canadian Human Rights Act,* section 7.

colleagues, and clients from COVID-19." He was aware of the option of accommodation for him on certified medical grounds, or on religion or another prohibited ground for discrimination under the *Canadian Human Rights Act.* He knew that he was required to disclose his vaccination status accurately as required by the Policy. He was aware that his refusal to be fully vaccinated or to disclose his vaccination status would lead to being placed on administrative leave without pay, and being told to stop working remotely. He did not comply with either option by the deadline of October 29, 2021. The employer suspended him effective November 15, 2021. That evidence shows that the Claimant knew that his conduct would get in the way of carrying out his duties toward his employer. His non-compliance with the Policy resulted in his suspension. That removed him from being able to carry out all of his duties toward the employer. That is a major way of getting in the way of carrying out his duties toward his employer.

[39] Second, was his non-compliance with the Policy wilful, conscious, deliberate, or intentional? He made a personal medical decision. The Claimant made his choice not to comply with the Policy. He thought about whether to comply or not. He put forward a number of reasons for not complying. He had put forward a well-thought-out position on the Policy. He had discussions with his employer and his union about the Policy. He pursued a lawsuit opposing the Policy. There is no doubt that the Claimant's non-compliance was wilful, conscious, deliberate and intentional.

[40] Third, did the Claimant's non-compliance with the Policy cause his suspension? There is no dispute that the non-compliance did result in his suspension.

[41] Fourth, did the Claimant know of the possibility of suspension for non-compliance? The Claimant had reviewed the Policy, and discussed it with his employer and his union. From that review and those discussions, he was aware of the possibility of suspension before he was suspended. He testified that he understood that he could be suspended for non-compliance. His manager told him that the manager's hands were tied, he had to apply the Policy. There is no doubt that the Claimant knew he would be suspended for non-compliance.

So, was the Claimant suspended from his job because of misconduct?

[42] Based on my findings above, I find that the Claimant was suspended from his job because of misconduct.

Conclusion

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

[44] This means that the appeal is dismissed.

Paul Dusome

Member, General Division – Employment Insurance Section