



Citation: *CS v Canada Employment Insurance Commission*, 2022 SST 976

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

## Decision

**Appellant:** C. S.

**Respondent:** Canada Employment Insurance Commission

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**Decision under appeal:** Canada Employment Insurance Commission reconsideration decision (456668) dated February 22, 2022 (issued by Service Canada)

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**Tribunal member:** Raelene R. Thomas

**Type of hearing:** Teleconference

**Hearing date:** July 13, 2022

**Hearing participant:** Appellant

**Decision date:** August 3, 2022

**File number:** GE-22-947

## Decision

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

[2] The Canada Employment Insurance Commission (Commission) has proven 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.<sup>1</sup>

## Overview

[3] The Claimant worked in a hospital but did not provide direct patient care. He lost his job. The Claimant's employer said he was let go because he did not comply with its COVID-19 Vaccination Policy.

[4] The Commission accepted the employer's reason for the dismissal. It decided the Claimant lost his job because of misconduct. Because of this, the Commission decided the Claimant is disqualified from receiving EI benefits.

[5] The Claimant does not agree with the Commission's decision. He says he has concerns with the COVID-19 vaccine, he should have a choice and not be fired for refusing the vaccine. The Claimant said the provincial government announced in November 2021 it will not be mandating the vaccine for hospital workers but his employer has continued with the mandated vaccine. The Claimant said other workers who were dismissed are being granted EI benefits without a medical or religious exemption, and he is deserving of EI.

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

## **Matters I have to consider first**

### **The employer is not an added party**

[6] Sometimes the Tribunal sends a claimant's former employer a letter asking if they want to be added as a party to the appeal. In this case, the Tribunal sent the employer a letter. The employer did not reply to the letter.

[7] To be an added party, the employer must have a direct interest in the appeal. I have decided not to add the employer as a party to this appeal, because there is nothing in the file that indicates my decision would impose any legal obligations on the employer.

### **The Claimant is not making a Charter Argument**

[8] In his appeal to the Tribunal, the Claimant indicated he might be making an argument that the Commission's decision to deny him EI benefits was a violation of the *Canadian Charter of Rights and Freedoms* (Charter). Because Charter appeals require a process that is different from a regular appeal, I wrote to the Claimant to send him information on Charter appeals and asked him to make a decision whether he wanted to proceed with a Charter appeal.

[9] The Claimant was given until June 3, 2022, to file a Notice of a Charter Argument.<sup>2</sup> He advised the Tribunal staff he would not be making a Charter argument so his appeal was returned to the regular appeal process. This means the Claimant will not be making a Charter argument and I will not consider whether the Commission's decision to deny her EI benefits violated the Charter.

### **Post hearing documents**

[10] At the hearing, the Claimant made reference to the employer's policy and to the provincial government's Directive No. 6. I asked the Claimant to send these documents

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<sup>2</sup> Section 20 of the *Social Security Tribunal Regulations* sets out the process for appeals related to the constitutional validity, applicability or operability of any provision of the *Canada Pension Plan*, the *Old Age Security Act*, the *Employment Insurance Act*, Part 5 of the *Department of Employment and Social Development Act*, or the regulations made under any of those acts.

to the Tribunal. I am admitting the documents into evidence because the information in the documents is relevant to the issue of whether the Claimant lost his job due to his own misconduct.

[11] The Commission was sent a copy of the documents. As of date of writing my decision the Commission has not made any submissions on the documents.

## **Issue**

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

## **Analysis**

[13] 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?**

[14] I find the Claimant lost his job because he did not comply with the employer's COVID-19 vaccination policy.

[15] The Claimant testified the provincial government issued a directive that required all hospitals to adopt a policy requiring all employees to provide proof of vaccination or to have medical exemption or proof of completing an education session. He said if employees did not do one of these things they had to do regular antigen testing. He applied for an exemption to vaccination on the basis of creed (faith). The employer did not grant the exemption request. The Claimant expected to be placed on an unpaid leave of absence for not getting vaccinated. The Claimant said it was not until the last week of his employment that it became clear to him he could be dismissed. The Claimant testified he did antigen testing for two weeks before he was fired.

[16] The appeal file has a letter dated October 22, 2021 from the employer to the Claimant. The letter states the Claimant met with his employer on October 13, 2021 at

which time it was confirmed the Claimant understood the outcome of not complying with the requirement to be vaccinated, he confirmed the employer's records that he was not vaccinated were correct and that he had not been granted an exemption. At the hearing I asked the Claimant if the information in the letter was correct. He replied that it was correct. The Claimant was dismissed from his employment on October 22, 2021 due to his non-compliance with the vaccination policy.

[17] The evidence tells me that the Claimant was required to comply with the employer's policy that he be vaccinated or have been granted an exemption to vaccination by October 21, 2022. He did not have an exemption and he was not vaccinated by that date. As a result, I find the Claimant lost his job because he failed to comply with the employer's vaccination policy.

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

[18] Yes, the reason for the Claimant's dismissal is misconduct under the law. My reasons for this finding follow.

[19] To be misconduct under the law, the conduct has to be wilful. This means that the conduct was conscious, deliberate, or intentional.<sup>3</sup> Misconduct also includes conduct that is so reckless that it is almost wilful.<sup>4</sup> 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.<sup>5</sup>

[20] There is misconduct if the Claimant knew or should have known his conduct could get in the way of carrying out his duties toward his employer and there was a real possibility of being let go because of that.<sup>6</sup>

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<sup>3</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36. This is how I refer to court decisions that apply to the circumstances of this appeal.

<sup>4</sup> See *McKay-Eden v Her Majesty the Queen*, A-402-96.

<sup>5</sup> See *Attorney General of Canada v Secours*, A-352-94.

<sup>6</sup> See *Mishibinijima v Canada (Attorney General)*, 2007 FCA 36.

[21] The Commission has to prove the Claimant lost his job because of misconduct. The Commission has to prove this on a balance of probabilities. This means it has to show it is more likely than not that the Claimant lost his job because of misconduct.<sup>7</sup>

[22] The Commission says the Claimant's employment was terminated due to his failure to comply with the employer's vaccination policy. It says the Claimant acknowledged that the employer informed him of their Covid-19 vaccination policy and of the consequences of failing to comply. He was fully aware that failure to comply with the employer's vaccination policy would cause a loss of employment. The Commission says the Claimant willfully made the decision not to comply with the employer's vaccination policy knowing that the behavior would have a negative impact on the employment relationship. It says the Claimant's loss of employment was due to a direct result of his behavior. The Commission goes on to say because the Claimant willfully refused to comply with the employer's Covid-19 policy, and there is clear causality between the refusal to follow the policy and the dismissal, it concluded the Claimant's failure to comply with the employer's vaccination policy constituted misconduct within the meaning of the EI Act.

[23] The Claimant testified that he works in a hospital but is not involved in patient care. He said the provincial government brought in a directive that applied to all hospitals. The directive required that hospitals adopt a policy that required employees to provide proof of receiving the COVID-19 vaccine or proof of a medical exemption to vaccination or complete an education session.

[24] The Claimant testified the employer's policy said that those who did not get vaccinated would be placed on two weeks of unpaid leave. His manager said this as well. The Claimant completed the education session and said it could have been better because it did not discuss side-effects. The Claimant said he did antigen testing in the two weeks before he was fired. He felt the hospital should have continued with the testing.

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<sup>7</sup> See *Minister of Employment and Immigration v Bartone*, A-369-88.

[25] The Claimant said the provincial directive was revoked on March 9, 2022. He thought that it would be a real opportunity to be recalled to work once the restrictions were lifted. The Claimant thought that he should have been placed on an unpaid leave for not getting the vaccine and not dismissed. He said it was not clear to him that he could lose his job. It was not clear or obvious that the end of the unpaid leave of absence would be termination of his employment. He thought that his request for exemption would be approved. He said that it was not until the last week of his employment that it became clear to him he could lose his job.

[26] The Claimant testified he submitted a request for an exemption to vaccination in early October 2021. He based his request on creed (faith) and submitted a letter from his faith leader. The employer did not reply to his request. He assumed his exemption request was denied based on the meeting being scheduled for October 13, 2021. The Claimant said at the meeting on October 13, 2021 he was told if he chose to get vaccinated there would be two weeks' unpaid leave following vaccination to allow for immunity. He said he did not have enough information to make a decision about the vaccine.

[27] The Claimant said his union has filed a grievance on his behalf. He has not made a complaint to the provincial human rights commission.

[28] The Claimant submitted that the employer's policy was not reasonable. A person can still catch and transmit the virus if vaccinated. He worked for his employer for the past 21 years and has never been disciplined. He noted the Commission says it does not want to consider the effectiveness of the vaccine but goes on to say the employer's policy was reasonable, that is contradictory.

[29] I find the Commission has proven there was misconduct, because it has shown the Claimant made the conscious, deliberate and willful decision to not comply with the employer's policy when he was aware that not complying could lead to him being dismissed from his job. My reasons for this finding follow.

[30] The Claimant testified he was aware of the employer's policy. He knew that he had to comply with the policy. Complying with the policy meant he had to provide proof he received the COVID-19 vaccines or have an approved exemption. The Claimant's employer announced in August 2021 that all employees had to receive a second dose of the COVID-19 vaccine no later than October 8, 2021 and that "those who failed to do so will face discipline up to and including termination."

[31] The employer revised its policy on September 3, 2021. The revised policy required all employees to be fully vaccinated against COVID-19 by October 21, 2021 and provide proof confirming they received all required COVID-19 vaccination doses. The policy said beginning October 22, 2021 only those with a valid medical exemption or those with exemption under the human rights code would be accommodated through self-administered rapid antigen testing. The policy goes on to say staff who are deemed not vaccinated per the policy will not be accommodated and will not be allowed to report to work. It says those staff will be placed on an unapproved, unpaid leave of absence until they are 14 days past being fully vaccinated.

[32] The Claimant applied for an exemption to vaccination in early October 2021. He met with his employer on October 13, 2021. During that meeting he confirmed that he was not vaccinated and that he understood the consequences of not complying with the policy. He was advised in the meeting that the employer would be scheduling his termination for October 22, 2021 due to his non-compliance with the policy. He testified that it was not until the last week of his employment that it became clear to him he could lose his job. The Claimant remained unvaccinated by October 22, 2021 and was terminated from his job.

[33] The evidence tells me the Claimant was aware of the policy that if an employee did not get vaccinated or did have an approved exemption they would not be allowed to work. The Claimant's employer refused his request for exemption when it met with him on October 13, 2021 to confirm that he was not vaccinated and to advise that he would be terminated on October 22, 2021 for non-compliance with the vaccination policy. This means the Claimant made the conscious, deliberate and willful decision to not comply



with the policy when he knew that by doing so he could be terminated from his job. As a result, I find that the Commission has proven the Claimant was terminated from his job due to his own misconduct within the meaning of the law and the case law described above.

### **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.

### **Conclusion**

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

[36] This means the appeal is dismissed.

Raelene R. Thomas  
Member, General Division – Employment Insurance Section